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Reports of Cases
DECIDED BY
THE RAILWAY AND CANAL
COMMISSIONERS.

BY
RALPH NEVILLE, LL.M.,
OF THE INNER TEMPLE AND NORTHERN CIRCUIT,
BARRISTER-AT-LAW,
W. A. ROBERTSON, B.A.,
OF THE INNER TEMPLE AND NORTH-EASTERN CIRCUIT,
BARRISTER-AT-LAW,
AND
W. S. KENNEDY, LL.B.,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOLUME XVI.
OF
RAILWAY AND CANAL TRAFFIC CASES.

LONDON :
SWEET & MAXWELL, LIMITED,
3 CHANCERY LANE, W.C.2.

1920.

PRINTED BY
THE EASTERN PRESS, LIMITED,
LONDON AND READING.

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THE RAILWAY AND CANAL COMMISSIONERS.

1915-1920.

Ex Officio Commissioners.

FOR ENGLAND :

THE HON. MR. JUSTICE LUSH.

FOR SCOTLAND :

THE HON. LORD MACKENZIE.

FOR IRELAND :

THE RIGHT HON. MR. JUSTICE KENNY.

Appointed Commissioners.

THE HON. A. E. GATHORNE-HARDY (1915-1918).

SIR JAMES WOODHOUSE (CREATED BARON TERRINGTON OF HUDDERSFIELD, 1918).

E. TINDAL ATKINSON, Esq., K.C. (1919-1920).

Commerce

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DIGEST OF CASES ⁽¹⁾

Relating to Railways decided in the Superior Courts of Law.

CLASSIFICATION OF MERCHANDISE.]—See *Goods Traffic*, No. 4.

COMMON CARRIER.]—1. A furniture remover who undertakes to carry furniture after inspecting it and giving an estimate for the cost of carriage does not undertake the liability of a common carrier. *Watkins v. Cottell*, [1916] 1 K. B. 10; 85 L. J. K. B. 287; 114 L. T. 333; 32 T. L. R. 91.

2. Wharfingers were authorised to deliver certain goods to a railway company. A carman in the service of the company, but not then on duty, went in uniform with a horse and cart of the company to the wharf, obtained the goods, and converted them to his own use. The company prosecuted him to conviction, laying the property in the goods in themselves:—*Held*, by Rowlett, J., that the company were not liable as common carriers, as they had not ratified possession of the goods under a contract of carriage. *Harrisons & Crossfield v. London and North-Western Ry. Co.*, [1917] 2 K. B. 755; 86 L. J. K. B. 1461; 117 L. T. 570; 33 T. L. R. 517.

3. Under the statutes dealing with railways there is no obligation on a railway to be a common carrier. *Smith (W. R.) & Sons v. London and North-Western Ry. Co.*, 35 T. L. R. 99.

4. The proprietor of motor lorries who reserves the right to accept or reject offers of goods for carriage by such lorries is not a common carrier. *Belfast Ropeworks Co. v. Bushell*, [1918] 1 K. B. 210; 87 L. J. K. B. 740; 118 L. T. 310; 34 T. L. R. 156.

5. Purchasers of calico goods arranged with the vendors to forward the goods to them by the defendants' railway. The vendors had an agreement with the railway company, whereby they loaded and sheeted goods for themselves at their private siding, and obtained a rebate in respect of these services. The goods in this case were loaded and sheeted by the vendors at their siding, the wagon and sheet being supplied by the railway company; and were forwarded under a consignment note, upon which the company acknowledged that the goods were received in good condition. The goods being damaged in transit, owing to a defect in the sheet supplied by the railway company, the buyers claimed damages from them:—*Held*, by a majority of the House of Lords, that the railway company were liable either as common carriers or under the consignment note. *London and North-Western Ry. Co. v. Richard Hudson & Sons, Limited*, [1920] A. C. 324.

6. Where a common carrier receives goods for carriage knowing that they are insufficiently packed, and they are damaged in transit, he nevertheless may set up the defence that the damage was due to the insufficient packing. *Gould v. South-Eastern and Chatham Ry. Co.*, [1920] 2 K. B. 186.—Div. Ct.

(¹) This Digest is in continuation of the Digests in Vols. I. to XV.

DEMURRAGE OF WAGONS.]—See *Goods Traffic*, Nos. 5, 6, 7, and 8.

EQUALITY OF CHARGE.]—A railway company settled certain proceedings, complaining of unreasonable increases of rates which had been commenced by various colliery owners upon the terms that the said owners would pay for a limited period rates which, while more than the original rates, were less than the full amounts of the increased rates as at first charged. The railway company also carried for the defendant, who was not a party to the above compromise, similar traffic between the same points, and charged him the full increased rates. Upon his refusing to pay the amounts of such increases the company sued him for the same:—*Held*, that there was an inequality of “toll” within section 90 of the Railways Clauses Act, 1845, and that the railway company could not recover more than was charged to the traders who were parties to the compromise. *North Staffordshire Ry. Co. v. Edge*, [1920] A. C. 254; 89 L. J. K. B. 78; 36 T. L. R. 115.—H. L.

GOODS TRAFFIC.]—1. Carriage by Passenger Train. The plaintiffs delivered fruit to a railway company to be carried by passenger train on a consignment note, which provided that, in consideration of the goods being carried at a rate below that ordinarily applicable to goods so carried, the railway company would not be liable for delay, unless it were proved that such delay arose from the wilful misconduct of their servants. The fruit was despatched by passenger train, but in course of transit it was transferred to goods train. In consequence its arrival was delayed, and the plaintiffs suffered damage:—*Held*, that the carriage by passenger train was of the essence of the contract, and that, after the transference to goods train, the railway company were no longer performing their contract, and the fruit was not being carried at owner’s risk. The railway company were therefore liable. *Gunyon v. South-Eastern and Chatham Ry. Co.’s Managing Committee*, [1915] 2 K. B. 370; 84 L. J. K. B. 1212; 113 L. T. 282; 31 T. L. R. 344.

2. Carriers Act, 1830. The plaintiffs delivered to the defendant railway company three packages, each of greater value than £10, for carriage from London to Belfast. They made no declaration under the Carriers Act as to the nature and value of the goods. The goods were lost in transit, but there was no evidence as to whether they were lost during the land or sea part of the journey. The defendants relied on section 1 of the Carriers Act, 1830:—*Held*, that the Act applied only where goods were lost by land, and the railway company, having failed to show that the goods were lost during the land portion of the transit, were liable. *Ashton & Co. v. London and North-Western Ry. Co.*, [1920] A. C. 84; 88 L. J. K. B. 57.

3. Carriers Act, 1830. A parcel containing glass exceeding £10 in value was handed to the defendant railway company for conveyance. The value was not declared, but the plaintiff’s servant stated that he wished to insure the goods. A company’s risk rate for glass under £10 in value was charged. A notice was displayed in the defendants’ receiving office, stating that an increased charge must be paid for glass over £10 in value in order to render the company liable for loss or damage. The glass was broken in transit:—*Held*, that there was no special contract within section 6 of the Carriers Act, and that the railway company were protected under section 1 of the Carriers Act, and therefore were not liable for the damage. *Doe v. London and North-Western Ry. Co.*, [1919] 1 K. B. 623; 88 L. J. K. B. 737; 120 L. T. 612.—Div. Ct.

4. Classification. Fish caught in Canada was frozen hard as soon as caught, packed in grease-proof paper, and put in boxes adapted for cold storage. It was then shipped to Liverpool, and sent thence by train to Leicester. The railway company brought an action to recover payment of carriage; and the question was

raised whether the goods were to be charged as "fresh fish" under class 4 of the Company's Rates and Charges Order, 1891, or as "preserves (fish . . .) in casks boxes or cases" under class 2, or as unclassified merchandise under class 3:—*Held*, by the House of Lords, that the goods were chargeable as "preserves (fish . . .) in boxes" under class 2. *Wm. Warners, Sons & Co. v. Midland Ry. Co.*, [1918] A. C. 616; 87 L. J. K. B. 810; 119 L. T. 263; 34 T. L. R. 472.

5. Demurrage. An action to recover charges for the detention of wagons under section 5, sub-section 4 of the Rates and Charges Orders can only be maintained when the defendant has agreed and failed to pay the sum demanded. If no agreement to pay can be proved, but only a refusal, the case is one in which a difference has arisen within the section, and the matter must be referred to an arbitrator. *London and North-Western Ry. Co. v. Jones*, [1915] 2 K. B. 35; 84 L. J. K. B. 1268; 113 T. L. R. 724.

6. Demurrage. Two wagons containing goods arrived at the plaintiffs' station on a Friday afternoon, consigned to a trader, who gave notice to the railway company to transfer the goods to the defendant. Notice was sent by the plaintiffs to the defendant the same day, and received by him on the Saturday, stating that demurrage would be charged if the trucks were not unloaded and the goods removed within forty-eight hours after the despatch of the notice, the working hours being up to 6 p.m. and on Saturdays to 1 p.m. Unloading took place on Saturday up to 1 p.m., all Monday, and was finished on the Tuesday. The plaintiffs claimed demurrage for one truck on Tuesday:—*Held*, that a privity of contract between the plaintiffs and the defendant was established by the receipt and acceptance of the advice note; that in calculating the period of forty-eight hours the whole of each day, including Saturday after 1 p.m., but excluding Sunday, must be counted, and the defendant was therefore liable for demurrage. *Lancashire and Yorkshire Ry. Co. v. Swann*, [1916] 1 K. B. 263; 85 L. J. K. B. 694; 114 L. T. 517; 32 T. L. R. 188.

7. Demurrage. A railway company published a circular, informing traders that demurrage charges for the undue detention of wagons would be made, and that the person by whom an order for wagons was given would be held primarily responsible for such charges. Wagons ordered by a consignor were delayed by the consignee after conveyance, and the railway company sought to recover the demurrage charges incurred from the consignor:—*Held*, that, the wagons having been supplied at the request of the consignor, he was primarily liable for the demurrage charges. *Glasgow and South-Western Ry. Co. v. Polquhain Coal Co.*, [1916] Sess. Ca. 36.

8. Demurrage. A railway company conveyed goods of the defendants from the latter's works to sheds of the Swansea Harbour Trust. The route lay partly on the company's own lines and partly over lines belonging to the Harbour Trust, the haulage throughout being done by the company. It was provided by the consignment note that "after the termination of the transit goods conveyed by the Company will be subject in addition to the charge for carriage to further charges for demurrage . . . no such charges to be made if the Company have not given proper opportunity for the removal of the goods and discharge." Notice was given to the defendants that, in the event of demurrage being incurred on wagons loaded by the defendants and detained on the lines of the Harbour Trust at Swansea, the defendants would be held responsible for such demurrage after four clear days. No delay took place during the transit over the plaintiffs' railway, but after the wagons had passed on to the lines of the Harbour Trust delays, not caused through any fault of the plaintiffs, occurred:—*Held*, (1) that the condition in the consignment note as to the defendants being given an opportunity to remove the goods referred only to events happening after the termination of the transit, and, further, that it did not refer to detention of wagons on the lines of the Harbour Trust; (2) that section 5, sub-section 4 of the Schedule to the Company's

Rates and Charges Order only referred to the detention of wagons before or after conveyance, and therefore did not apply to the present case; and (3) that the keeping by the company of the defendants' goods in their wagons until the consignees were ready and able to take them was a service rendered at the desire of the defendants under Part IV. of the above Order, and that, therefore, the company were entitled to charge demurrage under this head. *Great Western Ry. Co. v. Dafen Tinplate Co.*, [1917] 2 K. B. 177; 86 L. J. K. B. 785; 117 L. T. 148.

9. False Account. The manager of a limited company, having given a false account of goods, consigned to a railway company with the intent to avoid payment of the proper charges:—*Held*, that the limited company was guilty of giving a false account within sections 98 and 99 of the Railways Clauses Act, 1845. *Mousell Bros., Limited v. London and North-Western Ry. Co.*, [1917] 2 K. B. 836; 87 L. J. K. B. 82; 118 L. T. 25.

10. Lien; Stoppage in Transitu. Goods were delivered to a railway company for carriage upon the terms of a consignment note, containing (*inter alia*) the following condition: “All goods delivered to the company will be received, and held by them subject to a lien for money due to them for the carriage of, and other charges upon such goods, and also to a general lien for any other moneys due to them from the owners of such goods upon any account; and in case any such lien is not satisfied within a reasonable time of the date upon which the company first gave notice to the owners of the goods of the exercise of the same, the goods may be sold by the company by auction or otherwise, and the proceeds of the sale applied to the satisfaction of every such lien and expenses.” All freight and other charges had been paid in respect of the goods. The buyers were indebted to the railway company to the amount of £1,171 in respect of other services unconnected with the goods in question. The buyers were insolvent, and acquired the ownership of the goods by indorsement and delivery of the bill of lading. The sellers heard of the insolvency of the buyers while the goods were still in the possession of the railway company as carriers, and gave notice to the railway company of stoppage *in transitu*. Thereupon the railway company claimed that, under the consignment note, they had a lien as against the plaintiffs in respect of their existing debt of £1,171:—*Held*, by the House of Lords, that, under the above conditions, the railway company had no general lien on the goods in priority to the vendors' right of stoppage *in transitu*. *United States Steel Products Co. v. Great Western Ry. Co.*, [1916] 1 A. C. 189; 85 L. J. K. B. 1; 113 L. T. 886; 31 T. L. R. 561.

11. Short Delivery. A consignment of carcases of frozen mutton was carried by the defendant railway company on a consignment note, by the terms of which they were relieved from all liability for “loss, damage, misdelivery, delay or detention,” unless arising from the wilful misconduct of their servants, but not from any liability they might otherwise incur in the case of “non-delivery of any package or consignment fully and properly addressed.” It was further provided that no claim for loss or damage during the transit should be allowed unless made within three days after delivery of the goods in respect of which the claim was made, or “in the case of non-delivery of any package or consignment, within fourteen days after despatch.” When the consignment in question arrived twelve of a total number of 752 carcases were missing, and the plaintiffs made a claim within fourteen days after the date of despatch:—*Held*, by the House of Lords, that non-delivery of a consignment meant non-delivery in its entirety, and that the claim failed. *Wills v. Great Western Ry. Co.*, [1917] A. C. 148; 86 L. J. K. B. 641; 116 L. T. 615; 33 T. L. R. 254.

12. Wilful Misconduct. The plaintiffs consigned goods to the defendant railway company on an owner's risk note, which provided that, in consideration of the company receiving the goods not properly packed, they should not be liable for

loss or damage unless it were shown that it arose from the wilful misconduct of their servants. Some of the goods in question were in a crate on one of the defendants' lorries, which had to be moved to allow a tramway car to pass. The defendants' driver asked a man employed by the plaintiffs to hold the crate while he led the horse forward; but, notwithstanding, the crate overturned, and the goods were damaged:—*Held*, there was no evidence of wilful misconduct, and that the railway company were not liable. *Sheppard & Son v. Midland Ry. Co.*, 85 L. J. K. B. 283; 114 L. T. 515.

13. Wilful Misconduct. A railway company contracted to carry certain theatrical scenery and properties on the terms that they were relieved from all liability for damage, except on proof that it arose from wilful misconduct on the part of their servants. The goods were loaded on to the railway truck by the servants of the plaintiff, and the defendants' porters were then told to cover them over with a tarpaulin. When the goods reached their destination they were found to have been damaged by rain and snow. Evidence was given that the defendants' servants had covered the goods with a tarpaulin and fastened it down securely, but the jury found for the plaintiff:—*Held*, that, even assuming that the above evidence was untrue, there was no evidence of wilful misconduct, and the defendants were not liable. *Norris v. Great Central Ry. Co.*, 32 T. L. R. 120; 114 L. T. 183.

14. Wilful Misconduct; Alternative Rates. The defendant railway company were requested by the plaintiffs to send to their works a five-ton wagon to collect some machinery. A wagon only capable of bearing three tons was sent. This broke down, and the machinery was damaged. The consignment form used was one of the plaintiffs' own forms, with their name printed on it; and one of the plaintiffs' clerks wrote on the form, "pieces of over 2 tons O.R." The ordinary rate charged was 22s. 2d. per ton, and the owner's risk rate was 19s. 2d. The clerk understood by "O.R." that the plaintiffs would get the benefit of a reduced rate, and that the defendants would be liable for damage only if caused by the wilful misconduct of their servants. The plaintiffs had received a notice from the railway company in 1903 that the conditions in the ordinary railway company's consignment note alone would apply to goods carried at owner's risk:—*Held*, that there was a special contract within section 7 of the Traffic Act, 1854, the printed name on the plaintiffs' form being a signature within that section, and that the conditions were that the defendants were liable only for wilful misconduct. *Held*, also, that this condition was reasonable, as a fair alternative rate existed, and that, there was no wilful misconduct, and the defendants were not liable. *Joshua Buckten & Co. v. London and North-Western Ry. Co.*, 117 L. T. 556; 34 T. L. R. 119.

15. Wilful Misconduct. A parcel consisting of six cardboard boxes, each containing a pair of boots, was received by the defendant railway company on the terms of the usual owner's risk consignment note, the company being liable for loss arising from wilful misconduct on the part of their servants. During transit two pairs of boots were stolen, the empty boxes being replaced in the parcel. There was no evidence that the public had access to the parcel, and there was evidence that the trains on the particular route in question were mainly made up of corridor carriages, although there was no evidence that the train conveying the above parcel was made up of that class of carriage:—*Held*, that there was evidence that the boots had been stolen by a servant of the railway company, who therefore were liable. *H. C. Smith, Limited v. Midland Ry. Co.*, 121 L. T. 27.—C. A.

LIGHT RAILWAY.]—Where a single application is made to the Light Railway Commissioners for an order authorising the construction of several light railways forming one system, and the Commissioners authorise some of such railways and reject others, no appeal will lie to the Board of Trade against the refusal of an application for a light railway within section 7, sub-section 6 of the Light Railways

Act, 1896. *Rex v. Board of Trade; Rex v. Light Railway Commissioners*, [1915] 3 K. B. 536; 84 L. J. K. B. 2043; 113 L. T. 711; 31 T. L. R. 493.—C. A.

NEGLIGENCE.]—A railway company erected a footbridge as an alternative to a level crossing. On the occasion in question the steps of the bridge had become covered with frozen snow, owing to a blizzard. The plaintiff, on her way to catch a train, slipped, and was injured. The County Court Judge had found that the company had not exercised reasonable care to keep the bridge safe for those using it, and that there had been no contributory negligence on the plaintiff's part:—*Held*, by the Court of Appeal, that, the bridge having been dedicated to and accepted by the public, the public must take it as they find it, and that, there being no concealed danger or breach of duty on the part of the railway company, they were not liable. *Brackley v. Midland Ry. Co.*, 85 L. J. K. B. 1596; 114 L. T. 1150.—C. A.

PASSENGER'S LUGGAGE.]—1. The plaintiff, intending to travel on the defendants' railway, gave his luggage into the charge of a porter in uniform, who appeared to be employed at that particular station. The porter was, in fact, employed at another station of the defendants, and was not on duty at the time. While the luggage was in charge of this porter some of it was lost:—*Held*, that the defendants were liable as common carriers. *Soanes v. London and South-Western Ry. Co.*, 88 L. J. K. B. 524; 35 T. L. R. 267; 120 L. T. 598.—C. A.

2. An officer travelling from Southampton to Ryde by one of the defendant company's steamers gave his luggage at Southampton to a man in some kind of porter's uniform, who, with the concurrence of the defendants' servants, took it on to the steamer and placed it in the usual place for luggage. The luggage included a revolver, binocular glasses, and a flash lamp. The porter was not in the defendants' service. It was admitted that the defendants were common carriers. The luggage had disappeared on arrival of the steamer at Ryde:—*Held*, that there was evidence that the defendants had undertaken the liability of common carriers, and therefore were liable for the loss; also that the above articles were personal luggage. *Jenkyns v. Southampton Steam Packet Co.*, [1919] 2 K. B. 135; 35 T. L. R. 435.—C. A.

PASSENGER TRAFFIC.]—1. A Canadian railway company carried a man in charge of a horse as a passenger at a reduced rate by arrangement with the owner on a "live stock special contract." The contract in question was in a form authorised by section 340 of the Canadian Railway Act, 1906, and specifically relieved the company from all liability for injuries to the holder, even if caused by negligence of the company's servants. The document handed to the respondent (which he did not read) had printed on it in large type, "Read this special contract," and at the side was written, "Pass man in charge half fare"; but this was not part of the authorised form. The man was injured, owing to the negligence of the company's servants:—*Held*, that it might be inferred that the man accepted the conditions of the contract, and that the railway company were not liable. *Grand Trunk Railway of Canada v. Robinson*, [1915] A. C. 740; 84 L. J. P. C. 194; 113 L. T. 350; 31 T. L. R. 395. See also *Canadian Pacific Ry. Co. v. Parent*, [1917] A. C. 195; 86 L. J. P. C. 123; 116 L. T. 165; 33 T. L. R. 180.

2. The plaintiff had travelled on the railway of the defendant company, and on account of the length of the train the carriage in which she was stopped short of the platform on arriving at her destination. No warning was given by the stationmaster, who was on the platform; and no assistance was offered to the

plaintiff to alight. After waiting a quarter of an hour she got out of the carriage, missed her footing, fell, and was injured. She had not called for assistance, and the accident took place in daylight:—*Held*, that the facts disclosed no relevant cause of action, and the railway company were not liable. *Abbott v. North British Ry. Co.*, [1916] Sess. Ca. 306.—Ct. of Sess.

3. The plaintiff was a first-class season ticket holder on the defendants' railway. He had shown his ticket to a ticket collector, after which a porter in the employment of the defendants took him by the arm and in the presence of other persons charged him with having travelled first class with a third-class ticket. In an action for assault, slander, and false imprisonment:—*Held*, that the claim in respect of the slander would not lie in the absence of proof of special damage, since the offence of travelling without a proper ticket is not punishable by imprisonment; and, further, that, as the defendants had no power to arrest the plaintiff for the offence with which the porter charged him, they could not be taken to have impliedly authorised the arrest, and that the action must be dismissed. *Ormiston v. Great Western Ry. Co.*, [1917] 1 K. B. 598; 86 L. J. K. B. 759; 116 L. T. 479; 33 T. L. R. 171.

4. A person who purchases from another person (who has no authority to sell) a railway ticket marked "not transferable" has not paid his fare within section 5, sub-section 3 of the Regulation of Railways Act, 1889, and therefore commits an offence under that section. *Reynolds v. Beasley*, [1918] 1 K. B. 215; 88 L. J. K. B. 466; 120 L. T. 271.—Div. Ct.

5. A passenger who improperly uses the means of communication between passengers and the servants of the railway company provided on a train commits an offence within section 22 of the Regulation of Railways Act, 1868, although the train in question does not travel more than twenty miles without stopping. *Jones v. Bithell*, [1919] 1 K. B. 219; 88 L. J. K. B. 390; 120 L. T. 344.—Div. Ct.

6. A first-class carriage on a full train was inconveniently crowded by persons holding third-class tickets, who got in with the concurrence of the railway company's servants. The plaintiff, who travelled in the carriage with a first-class ticket, claimed damages for the alleged breach of contract by the company to afford reasonably proper accommodation:—*Held*, that, in view of the prevailing war conditions, there had been no breach of contract, although the standard of reasonable accommodation might be different under ordinary conditions. *Jones v. Northern Ry. Co.*, 34 T. L. R. 467.

RATING.]—Where a railway has earned no profit, but has a contributive value as a feeder to systems of its owners, the contributive value cannot be taken into account in assessing the rateable value of the line which must be assessed with regard only to the net earnings in the parishes in which it is situated. *Great Western and Metropolitan Cos. v. Hammersmith Assessment Committee; The Same v. Kensington Assessment Committee*, [1916] 1 A. C. 23; 85 L. J. K. B. 63; 113 L. T. 1074; 31 T. L. R. 608.—H. L.

SIDING RENT.]—A railway company may charge as for special services under Part IV. of their Charges Order for (a) shunting a private owner's wagon into and out of their sidings, to which it was sent for repair; and also (b) for siding rent while the repairs are being carried out. *London and North-Western Ry. Co. v. Duerden*, 85 L. J. K. B. 885; 114 L. T. 590; 32 T. L. R. 315.—C. A.

WORKS.]—1. A street railway company in Toronto was required by agreement "to keep clean and in proper repair that portion of the travelled road between the rails and for eighteen inches on either side thereof." Under an Act the:

Ontario Railway and Municipal Board may direct a railway company to make " changes improvements and repairs " in the " tracks " used by it :—*Held*, that the company were not liable under the agreement to do work which would give a new character to the road between the rails. *Toronto Suburban Ry. Co. v. Toronto Corporation*, [1915] A. C. 590; 84 L. J. P. C. 108.

2. A railway company, having built a bridge under statutory powers to carry a highway over their railway, is bound to maintain it in the same condition of strength relative to traffic as at the date of completion, but is not liable to maintain or alter it so as to accommodate the ordinary traffic of the present day. *Att.-Gen. v. Great Northern Ry. Co.*, [1916] 2 A. C. 356; 115 L. T. 235; 32 T. L. R. 674.—H. L.

3. Where in a special Act the only matters expressly referred to are the intended " line " and the " levels " thereof, and there is an alternative and practicable mode of carrying out the authorised work, and Parliament has not prescribed any particular method, a railway company are not entitled to select that method which is most burdensome to another railway company, and the latter are not obliged to grant an easement wider than the purposes of the work required. *Taff Vale Ry. Co. v. Cardiff Ry. Co.*, [1917] 1 Ch. 299; 86 L. J. Ch. 130; 115 L. T. 800.

RAILWAY AND CANAL TRAFFIC CASES.

DENABY AND CADEBY MAIN COLLIERIES, LIM.
v. GREAT CENTRAL RAILWAY CO.¹

Possession of Railroad by Government—Obligation of Railway Company to afford facilities—Jurisdiction of Railway and Canal Commission—Regulation of Forces, Act, 1871 (34 & 35 Vict. c. 86), s. 16.

March 31, 1915.—Where in pursuance of section 16,² of the Regulation of the Forces Act, 1871 (1), possession is taken of a railroad of a railway company by the Government under a warrant of the Secretary of State for War, which gives the Government power to take complete control of such railroad, it is consistent with the said section and warrant that the Government may delegate to the railway company the right to exercise the actual control over the working of the railroad subject to the paramount right of the Government.

Therefore, upon an application by a trader that the railway company under the above circumstances should afford reasonable facilities for his traffic, the Railway and Canal Commission have jurisdiction in such an application, and it rests with the railway company, who are *prima facie* responsible, to show that it is no longer within their powers to give such facilities.

This was an application for an order enjoining the defendants to afford all due and reasonable facilities for receiving, forwarding, and delivering the traffic of the applicants to and from their sidings at Denaby Main and

(1) Before Lush, J., and Commissioners the Hon. A. E. Gathorne-Hardy and Sir James Woodhouse, sitting at the Royal Courts of Justice, London.

(2) "When Her Majesty, by Order in Council, declares that an emergency has arisen in which it is expedient for the public service that Her Majesty's Government should have control over the railroads in the United Kingdom, or any of them, the Secretary of State may, by warrant under his hand, empower any person or persons named in such warrant to take possession in the name or on behalf of

Conisboro' and over the defendants' lines of railway; and also for an order enjoining the defendants to desist from subjecting the applicants to any undue prejudice in respect of their said traffic.

The applicants, who were owners of collieries in South Yorkshire connected by sidings with the defendants' railway,

Her Majesty of any railroad in the United Kingdom, and of any plant belonging thereto, or of any part thereof, and may take possession of any plant without taking possession of the railroad itself, and to use the same for Her Majesty's service at such times and in such manner as the Secretary of State may direct; and the directors, officers and servants of any such railroad shall obey the directions of the Secretary of State as to the user of such railroad or plant as aforesaid for Her Majesty's service.

Any warrant granted by the said Secretary of State in pursuance of this section shall remain in force for one week only, but may be renewed from week to week so long as, in the opinion of the said Secretary of State, the emergency continues.

There shall be paid to any person or body of persons whose railroad or plant may be taken possession of in pursuance of this section, out of moneys to be provided by Parliament, such full compensation for any loss or injury they may have sustained by the exercise of the powers of the Secretary of State under this section as may be agreed upon between the said Secretary of State and the said person or body of persons, or, in case of difference, may be settled by arbitration in manner provided by the Lands Clauses Consolidation Act, 1845.

Where any railroad or plant is taken possession of in the name of or on behalf of Her Majesty in pursuance of this section, all contracts and engagements between the person or body of persons whose railroad is so taken possession of and the directors, officers and servants of such person or body of persons, or between such person or body of persons and any other persons in relation to the working or maintenance of the railroad, or in relation to the supply or working of the plant of such railroad, which would, if such possession had not been taken, have been enforceable by or against the said person or body of persons, shall during the continuance of such possession be enforceable by or against Her Majesty.

For the purposes of this section "railroad" shall include any tramway, whether worked by animal or mechanical power, or partly in one way and partly in the other, and any stations, works, or accommodation belonging to or required for the working of such railroad or tramway.

"Plant" shall include any engines, rolling stock, horses, or other animal or mechanical power, and all things necessary for the proper working of a railroad or tramway which are not included in the word "railroad," section 16 Regulation of the Forces Act, 1871.

complained in their application dated March 27, 1915, that the defendants had neglected and refused on various occasions to remove from the applicants' sidings loaded wagons which had been tendered for conveyance, and also that the defendants were giving an undue preference to the proprietors of other collieries, who were supplying coal to the defendants.

At the outbreak of the war on August 4, 1914, an Order in Council was made in pursuance of section 16 of the Regulation of the Forces Act, 1871, declaring that an emergency had arisen in which it was expedient that His Majesty's Government should have control over the railroads of Great Britain, and the Secretary of State for War thereupon, in pursuance of the said section, had by warrant empowered the President of the Board of Trade to take possession on behalf of His Majesty of all such railroads, including that of the defendants. This warrant had been renewed from week to week as required by the above section, and the defendants' railroad at all material times had been in the possession of the Board of Trade accordingly.

The Order in Council and the original warrant of the Secretary of State for War were as follows:—

Order in Council under section 16 of the Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), declaring that an emergency has arisen in which it is expedient that His Majesty's Government should have control over the railroads of Great Britain.

At the Court at Buckingham Palace, the 4th day of
August, 1914.

PRESENT

The King's Most Excellent Majesty in Council.

Whereas by virtue of section 16 of the Regulation of the Forces Act, 1871, it is lawful for the Secretary of State, when His Majesty, by Order in Council, declares that an

emergency has arisen in which it is expedient for the public service that His Majesty's Government should have control over the railroads of Great Britain, or any of them, by warrant under his hand to empower persons to take such action in relation to any railroad in Great Britain as is mentioned in that section:

Now, therefore, His Majesty, by and with the advice of his Privy Council, is pleased to declare, and it is hereby declared, for the purposes of the said section 16, that an emergency has arisen in which it is expedient for the public service that His Majesty's Government should have control over the railroads of Great Britain.

ALMERIC FITZROY.

Warrant of the Secretary of State, dated August 4th, 1914, empowering the President of the Board of Trade to take possession of all the railroads (excluding tramways) in Great Britain under section 16 of the Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86).

Whereas by virtue of section 16 of the Regulation of the Forces Act, 1871, it is lawful for the Secretary of State, when His Majesty, by Order in Council, declares that an emergency has arisen in which it is expedient for the public service that His Majesty's Government should have control over the railroads in the United Kingdom, or any of them, by warrant under his hand to empower any person to take possession in the name or on behalf of His Majesty of any railroad in the United Kingdom, and of the plant belonging thereto, or any part thereof, and to take possession of any plant without taking possession of the railroad itself, and to use the same for His Majesty's service at such times and in such manner as the Secretary of State may direct.

And whereas His Majesty by Order in Council made the 4th day of August, 1914 has declared, for the purposes of the said section, that an emergency has arisen in which

it is expedient for the public service that His Majesty's Government should have control over the railroads in Great Britain.

Now, therefore, in pursuance of the said enactment, I, Herbert Henry Asquith, a Secretary of State, hereby empower the President of the Board of Trade to take possession on behalf of His Majesty of all the railroads, excluding tramways, in Great Britain and of the plant belonging thereto or any part thereof, and to use the same at all times during which this warrant or any renewal thereof remains in force for the conveyance of any of the naval or military forces of His Majesty, or of any goods, stores, or merchandise required for the use of His Majesty's Fleet or for the use of any of His Majesty's said forces, or to use the same for any other purpose, or in any other manner for or in which it is expedient to use it for His Majesty's service.

4th day of August, 1914.

H. H. ASQUITH.

On the hearing of a motion for an interim injunction, *Sir Edward Carson, K.C.* (with him *Lynden Macassey, K.C.*, and *F. T. Barrington Ward*), for the defendants, took the preliminary objection that the Government being in possession of their railroad, the Court could not grant an injunction against the railway company, and that the effect of the Government having taken over the line raised an entirely new and different state of facts to which the Railway and Canal Traffic Act, 1854, had no application. The officers of the company had become the officers of the Government, and the proper remedy was by petition of right against the Crown.

Leslie Scott, K.C. (with him *W. E. Tyldesley Jones*), for the applicants:

The railway company can only be required to afford facilities according to their powers. The possession of the Government is not an exclusive possession; all that the

Government does is to control the railroad for His Majesty's service, leaving the ordinary working of the system to be carried on by the defendants, subject to the requirements of such service. Nothing is said in the Act of 1871 as to contracts between a railway company and traders being affected, and the defendants' obligations to the public continue subject to the prior claim of the Government.

LUSII, J.: This case raises a question of very great importance and raises it in this way: Complaint is made by the applicants, the Denaby and Cadeby Main Collieries, Limited, against the respondents, the Great Central Railway Company, that the company have not afforded those reasonable facilities for the conveyance of coal which they ought to afford under section 2 of the Railway and Canal Traffic Act, 1854, and they also complain that the railway company are giving an undue preference to other colliery companies in relation to the carriage of coal, and they apply to this Court for an interim injunction to restrain the railway company from doing what it is alleged they are doing until the trial of the action.

Sir Edward Carson, on behalf of the railway company, has taken a preliminary objection, and the preliminary objection is this: It is said that under the Regulation of the Forces Act, 1871, His Majesty has power, by Order in Council, if an emergency has arisen in which it is expedient that the Government shall control the railroads, to take possession of any railroad in the United Kingdom, and of the plant, and that the Government have exercised the powers under that statute and have taken possession of this railroad and of the plant belonging to this railway company; that, therefore, in consequence of that exercise of those powers, this application must fail, because if the applicants have any right to relief, that right must be exercised either by way of Petition of Right or in some other form by way of a claim against the Government, and this claim against the railway company,

therefore, on the face of it, is a claim that cannot be entertained.

At first sight when one looks at section 16 of this Act of 1871, and at the warrant which has been issued by which the Government have taken possession and control of the railway and plant, it does appear as if the effective control were, for all purposes, taken from the railway company; as if for all purposes the servants of the railway company had become the servants of the Government, or of the Secretary of State, and that the railway company, therefore, are no longer in a position either to afford or to withhold reasonable facilities.

But when one looks more closely into the section I come to the conclusion that that view is not correct. One must bear in mind, in construing the section and the warrant that has been issued under it, that this power to take possession of the railroad and plant is a power which is exercisable in order that the purposes of the Act of 1871 may be properly and adequately given effect to, and it is clear under the section that the purpose for which this possession may be taken, and control exercised, is that the Government may be in a position to use the railroad and plant for His Majesty's service, for the conveyance of troops and so forth. That is the purpose for which the possession is taken, and I think it is by no means unimportant to observe that in the first clause of the section, when the Legislature deals with the obligations of the directors and the servants of the railway company, what is said in the section is, not that the directors, officers and servants of the railway company shall, for all purposes, obey the directions of the Secretary of State as to the user of the railroad and plant, but that they shall obey those directions "for Her Majesty's service." I confess it seems to me that if Sir Edward Carson's view had been the right one, one would not have expected to find that limited obligation, or rather transfer of obligations, imposed by the section upon the servants of the railway company.

Now it appears to me that the true meaning of the section and of the warrant that has been issued under it, is that in order that the Secretary of State may be in a position to use the railroad and the plant for the effective conveyance of troops, munitions of war and so forth, the complete possession, and the right of taking complete control over the railway and plant, is given to the Secretary of State or the Government; that right has been given and the warrant shows that the Government has exercised the power to take that complete control. But it by no means follows that complete control has been taken and is being exercised for all the purposes under the warrant. It is quite consistent with the section, and consistent with the warrant itself, that although the possession has been taken, and the right to exercise the control is now vested in the Government, the Government may, from time to time, be still delegating to the railway company the right to exercise the actual control over the working of the railroad, in so far as the exercise of that control is subservient to the paramount right which is vested in the Government. That, in my view, is the true position.

If one were to take the opposite view, consequences would follow which, to my mind, are so serious that one can only come to the conclusion that they cannot have been contemplated. If Sir Edward Carson's view was the right view, it appears to me to follow that the powers of the railway company are paralysed with regard to the whole subject-matter of the railroad and the plant; it seems to me that no longer can any servant even sue a railway company for wages; that no longer can any cause of action, by reason of the negligence of one of the servants of the company, or of the Government, as the case may be, be put in suit against the railway company; that for all purposes the existence of the railway company is blotted out, and that whenever any remedy is sought by any member of the public or any person who is engaged in working the railroad, it must be sought by way of Petition of Right against the Government and that

no claim of any sort or kind can be entertained against the railway company. I think that that consequence is so serious that, unless one is compelled to say that that is the real meaning of the section, one ought to hesitate before one gives such an effect to this legislation. In my opinion, the true position is that which I have stated.

Therefore, I think that if a complaint of this kind is made, as it has been made, and if it should be established that reasonable facilities are not given, the burden is upon the railway company of showing that it is not within their powers to give them; in other words, that *prima facie* the railway company are still responsible and are still under the obligation of giving reasonable facilities, and that it rests upon them to show, before the Court makes an Order, that in fact it is no longer within their power to give the facilities which it is said they are not giving. When one remembers that the very terms of section 2 of the Traffic Act of 1854 are that the railway company shall, according to their respective powers, give these facilities it seems to me that the difficulty disappears. I think, therefore, that it is not true to say, by way of preliminary objection, that no such application as this can be entertained. I think the real view is that such an application can be made; that *prima facie* the applicants have the right to have reasonable facilities given to them by the railway company, and that it rests with the railway company in any particular case to show that it is not within their power to give those facilities, because the taking of the possession of the railroad and the plant, and the taking over of the control by the Government, has deprived them of the opportunity of giving the facilities which otherwise they would have been obliged to give.

Therefore, I must decide the preliminary objection against the respondents.

TRAFFORD PARK CO. v. CHESHIRE LINES COMMITTEE AND THE MIDLAND RAILWAY CO.¹

Through rates—Light Railway—Agreement that through rates shall be fixed by parties other than the Owning Company—Application for through rates notwithstanding such agreement—Existing through rates—Railway and Canal Traffic Act, 1888, s. 25.

April 27, 28. June 14, 15. July 28, 1915.—The applicants were the owners of a light railway constructed on the Trafford Park Estate, adjoining the Ship Canal at Manchester, and connected with the railway of the Cheshire Lines Committee at a junction known as Bridgewater Junction. In 1906 the applicants entered into an agreement with the Committee and the Midland, Great Northern, and Great Central Railway Companies, which provided *inter alia* (i) that the Committee and the other companies should have running powers over the railway of the applicants; (ii) that except in the case of a port rate, the Committee and the three companies should have the right to fix the rates to and from the railway of the applicants; and (iii) that the applicants and the other parties to the agreement should afford to each other all such reasonable facilities as regards traffic of all kinds as are usual between friendly railway companies for the convenient conduct and interchange of such traffic.

In 1915 the applicants were erecting on the Trafford Park Estate a bonded warehouse which they intended to use for tobacco traffic, and they made to the Cheshire Lines Committee and to the Midland Railway Company certain proposals for through routes and through rates for such traffic. The proposals were refused, and the applicants now applied to the Court for through routes and certain through rates for tobacco leaf from their bonded warehouse to London and to Bristol over the lines of the Committee and the Midland Railway Company.

Held, that the agreement did not give the exclusive user of the applicants' railway for through traffic to the defendants, and that the applicants were entitled to a through route and to convey traffic over their lines, to be interchanged with the defendants at Bridgewater Junction; but that under the agreement the Committee and the three companies alone had power to fix through rates, other than a port rate, for all through

(1) Before Lush, J., and Commissioners the Hon. A. E. Gathorne-Hardy and Sir James Woodhouse, sitting at the Royal Courts of Justice, London.

traffic passing to and from the applicants' railway, whether such traffic was worked by them under their running powers or not, and that therefore the application for through rates proposed by the applicants must be refused.

THE applicants were the owners of a system of light railways constructed on the Trafford Park Estate at Manchester under the West Manchester Light Railways Order, 1899. By section 32 of that Order the applicants were empowered to enter into agreements with the Cheshire Lines Committee, and the Midland, Great Northern, and Great Central Railway Companies with respect to the maintenance and management of the applicants' railways or any part thereof, the use or working of the railways and the conveyance of traffic thereon, the regulation, collection, transmission, and delivery of traffic coming from or destined for the undertakings of the contracting companies or any of them, and the fixing, subject to the authorised maximum, of rates and the collecting and apportionment of the tolls, rates, charges, receipts, and revenues levied, taken, or arising in respect of traffic.

Connection was made between the railways of the applicants and the railways of the Committee by means of a junction known as Bridgewater Junction, and on March 28, 1906, the applicants entered into an agreement with the Committee and the three railway companies which provided *inter alia*:

- (i) That the Committee and the companies should have the right in perpetuity (in common with the applicants and all other companies or persons having or acquiring the like right) to exercise running powers for the haulage of all descriptions of traffic originating in or destined for the Trafford Park estate;
- (ii) that in consideration of certain payments the applicants would afford to the Committee and to each of the railway companies respectively all reasonable facilities and accommodation as regards the aforesaid traffic for the convenient exercise of their running powers under the agreement;
- (iii) that the Committee and each of the companies should have the right to fix the rates to and from the applicants'

railway except in the case of a port rate; and (iv) that the applicants on the one hand and the Committee and the companies on the other hand should afford to each other all such reasonable facilities as regards traffic of all kinds as are usual between friendly railway companies for the convenient conduct and interchange of such traffic.

In 1915 a bonded warehouse was in course of erection at Trafford Park on land served by the applicants' railway, and the applicants intended to use it for tobacco traffic. On February 9, 1915, the applicants, by notice in writing, sent to the Cheshire Lines Committee and the Midland Railway Company certain proposed through routes and through rates for tobacco leaf from the bonded warehouse to London and to Bristol, over the lines of the Committee and the Midland Company, but their proposal was refused. The applicants then applied to the Court for an order (i) allowing the through routes and through rates proposed and (ii) requiring the Cheshire Lines Committee and/or the Midland Railway Company to receive the traffic at Bridgewater Junction and to forward and deliver it at the proposed rates and by the proposed routes to destination and to afford due and reasonable facilities for that purpose. By their answer the defendants objected that the granting of the proposed through rates was not a reasonable facility in the interests of the public; that the proposed through rates were unduly low; that the applicants did not possess any rolling stock and did not perform the ordinary functions of a railway company so as to be entitled to apply for through rates; that the proposed through routes were not convenient; that by the agreement the defendants had the right to fix the rates to and from the applicants' railway and that they already had in existence through rates for tobacco leaf; and, generally, that the applicants were precluded by the agreement from applying for through rates, and the Court had no jurisdiction to alter at the instance of one of the parties to the agreement rates which had been fixed under it.

R. Whitehead, K.C., and *E. Clements*, for the applicants:

The application is made under section 25 of the Railway and Canal Traffic Act, 1888. That section is applicable to owners of a light railway just as much as to the owners of an ordinary railway. The services and accommodation asked for, and the distance over which the traffic would be conveyed, are less in regard to traffic from Trafford Park than they are in respect of traffic of the same kind passing over the railway of the defendants from Liverpool to London and Bristol. The real question at issue is whether the fixing of a through rate in the interests of a trader wishing to make use of the defendants' railway is a public interest. The applicants are only asking the Court to enforce the section in the agreement providing that the defendants should give such reasonable facilities as would be given by a friendly railway company. In fact, it would be an advantage to the public to have an alternative route so that tobacco traffic of this kind, which at present is dealt with entirely at Liverpool, may also be dealt with at Manchester. The existing rates which the defendants describe as through rates are not really through rates to and from the railway of the applicants, but are only rates over the defendants' railway to and from Bridgewater Junction.

Holman Gregory, K.C., *Lynden Macassey, K.C.*, and *C. H. G. Campbell* (for *A. Moon*, serving with His Majesty's Forces), for the defendants:

The application is not in the public interest. The applicants are seeking to set aside the agreement and obtain an extra profit for themselves. In consideration of the payments to be made by the defendants under the agreement the defendants have the right to run over the applicants' lines between Bridgewater Junction and the warehouse without extra payment, but if the through rates now proposed are granted the applicants will claim to have an apportioned part of them. Under the agreement the defendants and the companies associated with them are entitled to haul the whole of

the traffic passing to and from the railway of the applicants, and every rate now quoted by the defendants to Bridgewater Junction is in fact a through rate to any siding on the premises of the applicants. To grant the rates now asked for would be to introduce competition which would cause serious injury to Liverpool and would not be in the public interest. This is really an application to reduce an existing through rate, and the Court will not entertain it—*Brunner, Mond & Co., Lim. v. Cheshire Lines Committee*¹, *Corporation of Birmingham v. Manchester, Sheffield, and Lincolnshire Railway Co.*². These cases show that where there is an existing rate the Court will not reduce it unless there is clear evidence both of public interest and of some compensating advantage to the railway company.

R. Whitehead, K.C., in reply:

The cases relied on only show that the Court will not disturb an existing rate unless the applicant can show that it is unreasonable, but the Court will consider all the circumstances in deciding whether the proposed new rate is reasonable. As to the effect of the agreement, even if the parties had agreed that the defendants alone should have the power to fix rates that would not exclude the jurisdiction of the Court. The guiding principle is to grant such an application if it is in the public interest—*Central Wales, &c., Railway Co. v. Great Western Railway Co.*³.

J. H. Balfour Browne, K.C., and *J. B. Aspinall* held a watching brief for the Manchester Ship Canal Co., Lim.

LUSH, J.: The applicants are the owners of a light railway constructed on an estate called the Trafford Park Estate in or near Manchester and belonging to the Trafford Park Estates, Lim. Their line is connected with a railway belonging to the defendants, the Cheshire Lines Committee. They have recently constructed a bonded warehouse for tobacco leaf

(1) *Ante*, Vol. XIV. 124.

(2) *Ante*, Vol. X. 62.

(3) *Ante*, Vol. IV. 110.

on their property connected by sidings with their railway, and they apply for the following facilities—namely, a through route from these sidings along the lines of the Cheshire Lines Committee and the Midland Railway Co. for the conveyance of the tobacco leaf from the warehouse, the applicants to have the right of having their through traffic interchanged at certain exchange sidings of the Cheshire Lines Committee some 400 yards below the junction called Bridgewater Junction, and a through rate from their warehouse to London and Bristol on the line of the defendants, the Midland Railway Co.

The defendants resist that application on two broad grounds: First, they say that by an agreement dated March 28, 1906, which was entered into between the Cheshire Lines Committee and three other railway companies and the applicants and the Trafford Park Estates, Lim., the applicants have bound themselves by contract to confer upon the railway companies, the exclusive right of conveying such through traffic, at rates to be fixed by those companies; *i.e.*, to confer upon the railway companies the exclusive right of conveying such through traffic at rates to be fixed by those companies; and, secondly, that the facilities ought not to be granted on grounds of convenience and public interest.

The first contention depends upon the construction of the agreement. The question was argued before us at the first hearing, but we postponed expressing our opinion as to the meaning of the agreement until we had heard the whole case. The answer of the defendants at that time was confined to the question of the through rate, but the defendants asked for and obtained leave to amend. They then challenged the right of the applicants to the through rate and raised a further contention as to group rates, which, however, was not persisted in.

The agreement is not very clear in its terms. Some of the expressions used in it no doubt give colour to the defendants' contention. But when one looks at the surrounding

circumstances and the position of the parties at the time it was entered into, its meaning becomes reasonably clear. At the time it was being negotiated there was an earlier agreement in existence dated December 30, 1902, the parties to which were the same four railway companies and the West Manchester Light Railways Co., the then owners of the light railway and the predecessors of the applicants. The object of that agreement was this: The Light Railway Co. had obtained statutory powers to construct a railway connecting their railway with that of the Cheshire Lines Committee and had power to obtain compulsorily lands of the Committee. The proposed order had been opposed by the four railway companies and the agreement was entered into by way of compromise to arrange terms for the construction by the Light Railway Co. of the connecting line with a junction and sidings and for the insertion in the order of the provisions necessary for that purpose. In lieu of the exercise of compulsory powers by the Light Railway Co. and of the statutory powers which they were seeking, the Cheshire Lines Committee agreed to grant to the Light Railway Co. an easement or right of constructing the connecting railway and the junction and sidings for the interchange of traffic, the latter to be maintained by the Light Railway Co. In consideration of certain payments to be made by the four railway companies to the Light Railway Co., the Light Railway Co. agreed to haul the traffic of the other companies from and to the exchange sidings to and from the premises of the traders served by the light railway. Then follow certain provisions as to the fixing of the rates, the payments to be made, and the affording of facilities for the interchange of traffic, which were in substance reproduced in the agreement which we have to construe. It is impossible to read this agreement without seeing that the Light Railway Co. were not only not giving to the other companies the exclusive right to convey the through traffic, but that they were constructing the connecting line and the junction and sidings with a view

to their conveying that through traffic and having it interchanged at the sidings.

Not long after this agreement was made, negotiations were entered into with a view to altering the arrangements for the construction of the connecting line and the junction and sidings, and the agreement now under consideration was entered into embodying these new arrangements. The scheme was altered, and, instead of the applicants, who had acquired the light railway, doing the work themselves, it was agreed that the four railway companies should do it. They were now given running powers concurrently with the applicants over the light railway, and provision was made (in clause 4) for the duties to be undertaken by the respective companies with regard to the maintenance of the railway and the running of the trains. It is true that in this clause the expressions "owning company" and "working company" were used, the former referring to the applicants and the latter to the four companies, but I do not see how it is possible to extract from this expression the inference that the applicants were to be treated as having given over the working of the railway to the four companies; on the contrary they were expressly said to have running powers concurrently with the four companies. With regard to their remuneration they were to receive a lump sum annually in lieu of a mileage rate and terminals, and certain tolls in addition. With regard to the rates, they were to be fixed by the four companies except in the case of a port rate, as to which the applicants were to be consulted. Then comes clause 13, which provides, as the earlier agreement in different language had provided, for the mutual granting by the applicants to the four railway companies and by the four companies to the applicants "as friendly railway companies" of reasonable facilities for the conduct and interchange of traffic. Now Mr. Holman Gregory, on behalf of the defendants, failed to give any satisfactory explanation of this clause on the hypothesis that the applicants would have no through traffic to have inter-

changed. It seems to me, after a careful consideration of the terms of the agreement, that this clause shows that the applicants, while giving and retaining running powers over the light railway, were still stipulating for the right to have their traffic interchanged, and that it is not possible to say that they contracted to give the exclusive right to convey the through traffic to the other companies. The fact is that all that the new agreement of 1906 did, was to alter the machinery by which the connecting line was to be made and to give running powers to the four companies for the purpose of conveying their traffic over the applicants' line. Mr. Holman Gregory argued that if the applicants were to be at liberty to compete with the other companies, the latter would be binding themselves to pay a large annual sum in perpetuity with the risk of losing a substantial part of their traffic, but the answer is that they paid this sum in lieu of mileage rates and terminals in consideration of the running powers and other rights which they obtained. This fact cannot, in my opinion, be relied on as showing that they were to obtain the exclusive user of the line for the conveyance of the through traffic. One must construe the document in order to see if they bargained for this monopoly, and, in my opinion, the document when fairly construed, having regard to the circumstances which I have mentioned, shows the contrary. I therefore am of opinion that the applicants have not contracted not to convey through traffic, and that, on the contrary, they have the right to have their traffic interchanged at the sidings on the Cheshire Committee's line below Bridgewater Junction, which was, and is the only place where such interchange is possible, and where, notwithstanding the evidence to the contrary, I think it can be interchanged. I do not think that any evidence has been placed before us which should lead us to the conclusion that this is not a proper facility to be granted to the applicants.

With regard to the through rate, however, I do not think that we can grant this without disturbing the bargain that

has been made. It has been agreed that the rates shall be fixed by the four companies, and I see no reason on the evidence before us for disturbing this arrangement or for altering the rate which is now in existence. In the result, therefore, the applicants are, in my opinion, not entitled to the through rate which they propose, but the through route is a facility to which they are entitled having regard to the agreement.

HON. A. E. GATHORNE-HARDY: I agree with the judgment which my lord has just delivered.

SIR JAMES WOODHOUSE: This is an application by the Trafford Park Co. for a through rate for a particular article, namely, tobacco leaf, imported *via* the Manchester Ship Canal and intended to be conveyed from the applicants' bonded warehouse in Trafford Park, Manchester, to London or Bristol *via* the defendants' railways.

The applicants are a statutory company incorporated in 1904, and own railways (originally constructed by the West Manchester Light Railways Co. as light railways) near to the docks of the Manchester Ship Canal Co., and they own or occupy warehouses at Trafford Park which are connected by sidings with their railway. The applicants' railways are connected with the defendants' railways by means of a junction called Bridgewater Junction on the south side of the bridge over the Bridgewater Canal which forms the southern boundary of the Trafford Park estate. From the main connecting lines of the Cheshire Lines Committee are branch lines which run into marshalling sidings constructed by that Committee on their own property on the south side of the Bridgewater Canal. These are about 400 yards from the point of junction.

The construction of these connecting lines and sidings was commenced under an agreement, to which the applicants' predecessors and the defendants, along with the Great

Central, and Great Northern Railway Companies, were parties, made in 1902 as the outcome of an application then pending to obtain compulsory powers for the purpose. By this agreement the Light Railway Co. (the applicants' predecessors) obtained the right to construct at their own expense a connecting railway with the railway of the Cheshire Lines Committee and also exchange sidings on the land of the Committee for the purpose of exchanging traffic between the light railway and the connecting companies, and it was part of the arrangement that the Light Railway Co. should haul the traffic of the Committee and the constituent companies from and to the sidings of the Committee, and that the Committee should fix the rates to and from the light railway which were to be quoted to the junction and not to include station or service terminals at Manchester. At this time the access to the ship canal premises from the Cheshire Lines Committee was by Cornbrook Junction, which was admittedly not a satisfactory connection.

By arrangement the connecting line and exchange sidings were constructed by the Cheshire Lines Committee, and instead of the Light Railway Co. paying them the cost thereof, the present applicants (who under their Act of 1904 had succeeded to the rights and interests of the Light Railway Co.) came to a new agreement with the Committee and its constituent companies dated March 28, 1906, which rescinded the one made in 1902. This agreement, whilst preserving the object of the original agreement, namely, access by the applicants to the defendants' railways, gave the defendants what they did not originally acquire, namely, running powers over the applicants' railway, not only to the applicants' premises but also to the docks and premises of the ship canal, the access to which had previously only existed by way of Cornbrook Junction. The connecting railway and exchange sidings having in fact then been constructed by the defendants on their own land, it was expressly stipulated that they should bear the cost thereof to the relief of the applicants.

It was also provided that the applicants should, if so requested by the Committee, haul the Committee's traffic from and to the sidings. As the consideration for these running powers and for hauling the traffic, the applicants, as the owning company, instead of receiving the usual terminal charges and allowances and a mileage proportion of the gross receipts, were to be paid a fixed yearly sum of £2,200 and an additional tonnage toll therein specified, varying with the nature and class of traffic, together with a further payment for hauling the traffic, if so required.

The agreement also provided that the foregoing payments should be in full discharge of all tolls, rates, and charges which might otherwise be payable to the applicants, and that the Committee should be entitled to the whole of the receipts including terminal charges. It further provided that the Committee and the other named railway companies should have the right to fix the rates to and from the applicants' railway, including therein all railways and railway sidings constructed or thereafter to be constructed on the applicants' land, but power was reserved to the applicants to object to any port rate quoted by the Committee for canal traffic. As ancillary to these provisions it was stipulated by clause 7 that the applicants should afford all reasonable facilities and accommodation for the convenient exercise by the Committee and the other companies of the running powers, and by clause 13 it was agreed that the applicants on the one hand and the several railway companies parties to the agreement on the other should afford to each other all such reasonable facilities as regards traffic of all kinds as were usual between friendly railway companies for the convenient conduct and interchange of such traffic.

The applicants apply for a through rate. They complain that when exceptional rates from Liverpool to Bristol and/or London *via* the defendants' railway are compared with the exceptional rates from Manchester to the same places for the like class of traffic although the latter is thirty-one miles nearer to

the destination, and the services at Liverpool in respect of station accommodation and terminal work are more costly, the rates at Liverpool are much more favourable to the trader than at Manchester, and relying on a decision of this Court in the case of the *Manchester Ship Canal Co. v. Midland Railway Co.*¹ in 1896 they ask that the rates from Manchester shall be made the same as those from Liverpool.

The defendants object to the proposed through rate on the ground that it would involve a reduction of an existing rate and would violate the provisions of clause 12 of the agreement which, as they contend, gives them the right to fix the rate for all through traffic.

The facility of a through rate imports that of a through route. That a continuous line of railway exists from the warehouse on the applicants' railway by means of the defendants' connecting lines to the termini mentioned in the claim is not questioned, but the defendants in this case contend that the Court cannot impose upon the defendants the obligation to receive and forward the applicants' traffic over their lines, first, because Bridgewater Junction, which is the point of junction between the applicants' line and that of the defendants, the Cheshire Lines Committee, is on the running line and is not a reasonably practical place for the interchange of traffic, and secondly because they have no sidings on their own line and have no right of access to the defendants' sidings near the junction, and that if they had, it would be a cause of obstruction to the general traffic to work their own locomotives into such sidings. This is not an application by independent traders. It is one by a railway company against other railway companies with which it has made an agreement. The Court is not free to deal with the application for a through rate as though no such agreement existed.

The rights and obligations of the parties must be determined with reference to its provisions. The first question is: Have

(1) Not reported.

the defendants agreed, as part of the bargain, to give the applicants the facility of having their traffic forwarded over the defendants' lines? It is obvious that to enable the applicants to do this they must have the right to have their traffic exchanged on the defendants' sidings near the Bridgewater Junction. It would clearly be impracticable to make any interchange on the running line. These sidings are about 400 yards from the point of junction. They are the sidings where the defendants marshal the traffic passing between their system and the applicants' railway. They are the identical sidings which the applicants' predecessors obtained power to construct, for the purpose of forwarding and exchanging their traffic under the agreement of 1902. They had been constructed and were in existence at the time the existing agreement was made in 1906. They were brought into existence for the express purpose of giving the light railway access to the defendants' lines. Now, clause 13 of the agreement under which the applicants claim this facility is, in my view, very clear in its language, and was inserted with a definite object and was a necessary corollary to the altered form of the original agreement. It provides that both the defendant railway companies (not merely the Cheshire Lines Committee whose line is immediately contiguous to that of the applicants, but also the Midland Co., over whose lines the through route to London and Bristol is continued) shall afford to the applicants all reasonable facilities usual between friendly railway companies, for the convenient conduct and interchange of traffic of all kinds.

Now what were the reasonable facilities which both the defendants as friendly railway companies could afford and contracted to afford to the applicants by way of convenient conduct and interchange of traffic? First, the Cheshire Lines Committee owned the sidings, and for the first part of the through route, the immediately connecting running line. The facility they could afford was, first, that of convenient conduct —that is of the receiving and forwarding over their own line

of the applicants' traffic, and, secondly, for this purpose the necessary interchange at the place where through traffic passing from one system to the other could only be marshalled and interchanged, namely, their own sidings. That was the only interchange between them which the applicants could possibly be in need of, or that it was necessary for them to provide for. It may be that but for this contractual obligation the defendants could not be ordered to give the applicants the use of these sidings. Upon that it is unnecessary to express an opinion, as, in my judgment, this facility is what the defendants expressly bargained to afford. Again, what facility did the Midland Company agree to afford to the applicants, if they did not undertake to receive and forward the traffic in continuation of the through route? Clearly the applicants obtain some right under this clause, which is an integral part of the bargain, to which effect ought to be given, and I can put no other interpretation upon its language consistent with reason than that which I have stated.

Evidence was called to show that there would be considerable difficulty to work the traffic over the line connecting with the sidings, if the applicants were entitled to run their own engine down to the sidings. This was obviously an after-thought. It was no part of the original case of the defendants. It was not mentioned in the pleadings prior to the hearing, but leave was then sought to amend. On the question of fact the defendants failed to convince me. The traffic is at present worked by the locomotives of the Ship Canal Company. The defendants have the right to require that the entire haulage between the sidings and the applicants' premises shall be done by the applicants, which would then get rid of any such difficulty as was suggested.

That the route is a continuous route is not denied, and to refuse the applicants this facility on the ground that it is not a reasonable facility, would in my opinion deprive them of a right which the defendants have expressly agreed that they shall have.

The next question is, Are the applicants entitled to the through rate for which they ask? Here, again, I think the question is settled by the contract. Clause 12 expressly provides that the defendants shall have the right to fix the rates to and from the railways. The applicants contend that this power is limited to such traffic only as the defendants convey by virtue of the running powers given to them under clause 6 of the agreement, and that it has no application to traffic which the applicants may haul and tender at their junction to the defendants as the carrying company. It seems to me, however, quite repugnant to common sense and fairness that the applicants, having agreed that the defendants should have the right to fix a rate for through traffic which included a stipulated payment to them, should be able to have a lower rate fixed for competing traffic carried by them over the same route and within the same limits. This is in effect what the applicants are asking for, and they invoke the assistance of the Court to obtain it on the ground that it would be in the public interest, and an advantage to the trade at the Manchester Docks. I think on this application that we cannot disregard the contract between the parties, and that it would be inequitable to do so. For these reasons and on this ground I think this application for a through rate should be refused.

Solicitors—Neish, Howell & Haldane, for the applicants; Beale & Co., for the defendants; Grundy, Kershaw, Samson & Co. for the Manchester Ship Canal Co.

READ, HOLLIDAY & SONS, LIM. v. MIDLAND RAILWAY CO. AND NORTH EASTERN RAILWAY CO.¹

Practice—Undue Preference—Comparison of Local and Through Rates—Joinder of Railway Companies parties to Through Rates—Railway and Canal Traffic Act, 1854, s. 2.

June 15. July 5, 1915.—The applicants complained that the Midland and North Eastern Railway Cos. were unduly preferring certain competitors by charging them for the carriage of traffic from certain points to two stations on the North Eastern Railway lower rates than the rates charged the applicants by the Midland Co. alone for the carriage of similar traffic from the same points to the applicants' works. The North Eastern Co., who were not concerned with the applicants' traffic or the rates charged thereon, took out a summons that they should be struck out of the application.

Held, by the Court of Appeal, reversing the decision of Lush, J., sitting as ex-officio Railway Commissioner, that inasmuch as no relief could be obtained and no order could be made against the North Eastern Railway Co., and as no practice requiring the joinder of all the parties to a through rate had been established, the name of the North Eastern Railway Co. ought to be struck out of the application.

The applicants carried on business as dye and chemical manufacturers at Huddersfield, and for the purposes of their business purchased from various collieries large quantities of coal-tar naphtha, which was forwarded over the railway of the Midland Railway Co., and delivered to them at Huddersfield, and for which certain rates set out in the application were charged them by the Midland Co. The North Eastern Railway Co. were not concerned with the above traffic or the rates thereon. The applicants in their application alleged that both the defendants, the Midland and the North Eastern Railway Companies charged certain of their trade competitors at Hull and Middlesbrough

(1) Before Lush, J., and Commissioners the Hon. A. E. Gathorne-Hardy and Sir James Woodhouse, sitting at the Royal Courts of Justice, London.

respectively for the carriage of similar traffic from the same collieries to Hull and Middlesbrough the rates set out in the application, which rates, or in the alternative the portion thereof belonging to the Midland Company, constituted an undue preference of the said competitors and unduly prejudiced the applicants. They claimed, *inter alia*, an order directing the Midland and North Eastern Companies, or in the alternative the Midland Co., to desist from giving any undue preference to their said competitors and from subjecting the applicants to any undue prejudice.

There was a second similar application against the Great Central, Lancashire and Yorkshire, London and North Western, and North Eastern Railway Companies, in which certain rates charged the applicants by the first three companies were compared with certain other rates charged the said competitors by the Great Central and North Eastern Companies. As in the first case, the North Eastern Co. were not concerned with the rates charged on the applicants' traffic.

The North Eastern Railway Co. took out summonses that their name should be struck out of both applications and all subsequent proceedings therein. These were dismissed by the Registrar.

The North Eastern Co. appealed.

G. J. Talbot, K.C., and W. A. Robertson, for the appellants:

The North Eastern Railway Co. cannot possibly be guilty of undue preference, because it is a party to only one set of rates. No order, therefore, can be made against it, and it ought not to be a party to these proceedings. In *Chance and Hunt v. London and North Western Railway Co.*¹, all the rates were to the same destination, and the defendant railway company asked that the other companies who were parties with them to the rates complained of should

be before the Court. No claim founded on undue preference will lie where the comparative routes are over the lines of different companies. *Grayson Lowood & Co. v. Great Central Railway Co.*¹

W. J. Disturnal, K.C., and F. J. Wrottesley, for the applicants:

The practice was settled by *Mapperley Colliery Co. v. Midland Railway Co.*² and *Chance and Hunt v. London and North Western Railway Co.*³ that in cases involving the examination of through rates, all the companies who are parties to such rates should be before the Court. This is for the purpose of convenience, and also possibly for the purpose of estoppel on the judgment. It is usual to bring before a Court as a defendant a party against whom no relief is claimed—e.g., the joinder as defendant of a person having a joint right who refuses to join as plaintiffs. *Lever Brothers v. Midland Railway Co.*⁴ was also referred to.

LUSH, J.: I must confess that I feel very great difficulty in this case. The applicants have joined the defendants, the North Eastern Railway Co., against whom, so far as I can see, they ask for no relief of any sort or kind, and they seek to justify it by saying that they are attacking the through rate to which the North Eastern Railway Co., as well as the Great Central Railway Co.⁵ and other companies, are parties. They are attacking it because they say that the other railway companies are unduly preferring the competitors of these applicants to the applicants themselves. They do not ask, as I say, for relief against the North Eastern Railway Co., but they say that they cannot ask the Court successfully to investigate the through rate unless all the companies who are parties to it are before the Court.

(1) *Ante*, Vol. XIII. 281.

(2) *Ante*, Vol. IX. 147.

(3) *Ante*, Vol. XIII. 286.

(4) *Ante*, Vol. XIII. 301.

(5) The learned Judge dealt with the facts in the second case, but the question in issue was the same in both cases.

But for the authorities, I should have felt very great doubt whether the applicants are entitled to place the North Eastern Railway Co. in such a position. It is quite true that in many cases a plaintiff in an action in the High Court can join as defendant a party against whom no relief is sought. Mr. Disturnal gave me one instance. But they are cases, as I understand them, in which the party who is made a defendant has improperly refused to allow his name to be used as co-plaintiff, and one can well understand, in a case of that kind, that the capricious refusal of a person to join as a plaintiff ought not to be allowed to defeat justice; therefore, the Court has said, in such a case: If you will not join as a plaintiff, you may be made a defendant. But the North Eastern Railway Co. are not in that position here. They are simply parties to a through rate. It cannot be said that they have preferred one trader to another, because they are only parties to one of the rates; they are not parties to the other rates at all, which have to be compared with the through rate to which they are parties.

But, when one turns to the authorities, it seems to me that this Court has laid down a very distinct and clear principle, to this effect, that where a through rate is to be attacked, and where it will be necessary for the Court to investigate it, it will be proper, upon the preponderance of convenience, to join as defendants all the railway companies who are parties to the through rates. In the case of the *Mapperley Colliery Co. v. Midland Railway Co.*¹, a complaint was made as to the improper increase of a rate, and Collins, J., upon an application in regard to joining all the railway companies who are parties to it, said this: "I am clearly of opinion, and I think we are all of opinion, in this case, that it cannot be satisfactorily dealt with unless the other railway companies interested in this through rate as well as the Midland Co. are before the Court. I agree with Mr. Sutton that the

terms of the Act of Parliament do not in themselves impose upon the applicant the obligation of joining all the other companies as a condition precedent to proceeding with his claim; and, for the same reason, I do not think he would be bound to join all the other companies in the preliminary discussion before the Board of Trade. But very different consideration arise when the matter comes before us. We have to deal with the case, and to put it in train for complete discussion and consideration before us. I do not think we should be in a position to give it that complete consideration which we are bound to give it, unless we had all the parties interested in the question before us." I do not think it is necessary to read the rest of the Judgment. In the case of *Chance and Hunt, Ltd. v. London and North Western Railway Co.*,¹ a similar question arose. The Registrar there upon a summons made an order: "That the defendants should inform the applicants' solicitors of the companies interested in the through rates complained of; that the places on the railways of such other companies and so much of the application as related thereto should be struck out; or, alternatively, that the applicants should have leave to join such other companies as co-defendants." There was an appeal against that order and the Court held, it seems to me, on precisely the same grounds, that where a through rate was to be considered, it was necessary, having regard to the balance of convenience, that all the parties concerned in the making of the rate should be before the Court. Mr. Talbot has sought to distinguish the present case from those on this ground. He says that in those two cases an attack was really made upon the railway company whom the Court ordered to be joined, whereas, in this case, he says, it is not so, and that in this case the only possible reason for joining the North Eastern Railway Co. is to make it easier for the Court to investigate and consider the composition of the through rate

and the terms upon which it was granted. I do not think that that distinction, although I feel the force of it, is a sufficient distinction to entitle us to lay down a different principle from that which is laid down in the two cases I have cited. I cannot help thinking that the intention was to lay down this rule, that where a through rate is going to be discussed, the Court ought to have before it all those companies who are parties to it in order that complete discussion and investigation should take place.

I therefore think that the order of the Registrar was right, but I wish to say this. There may be a difficulty about the costs, if the North Eastern Railway Co. are joined, and it turns out there never was any real reason for contending that the through rate was unfair. Whether the order that I am going to make now will be effective or not will be a matter for discussion hereafter, but I think we ought, in affirming the order of the Registrar, to say that we reserve the costs of the application and all the costs that are consequent upon it. It may turn out that that reservation will go far in some way to deal with the question of costs if it turns out that this application is not founded on any substance at all.

For these reasons I think that the appeal should be dismissed.

The North Eastern Railway Co. appealed.

G. J. Talbot, K.C., and W. A. Robertson, appeared for the appellants.

W. J. Disturnal, K.C., and F. J. Wrottesley, for the respondents.

The arguments were substantially the same as in the Court below.

LORD COZENS-HARDY, M.R.: This is an appeal from a decision of the ex-officio Commissioner arrived at after considerable difficulty. An application was made by the North Eastern Railway Co. for a declaration that they ought not to be

brought into this litigation between Read, Holliday and Sons and the Midland Railway Co. Now, who are Read, Holliday and Sons? They are carrying on business in Huddersfield. With whom do they deal so far as this application is concerned? They deal only with the Midland Railway Co. Their contracts are made with the Midland Railway Co. to carry goods to or from Huddersfield from or to certain stations of the Midland Railway. But the case they make is this: They say there is an undue preference because other goods go by through rates partly over the line of the Midland Co. and partly over the line of the North Eastern Co. to Hull and Middlesbrough, and they say: "Comparing these through rates with rates charged to us who only use your line, you are charging us more than you are charging other people who send to destinations on the North Eastern Railway."

The application asks for an order that the defendants respectively (that is the two defendants, the Midland Railway Co. and the North Eastern Railway Co.), or in the alternative the Midland Railway Co., shall "desist from giving any undue or unreasonable preference or advantage to the applicants' said competitors, and enjoining the defendants, or, in the alternative the defendants the Midland Railway Co., from subjecting the applicants to any undue or unreasonable prejudice or disadvantage."

I ventured to put a question to counsel for the applicants who certainly did not satisfy me, if I may say so, that he could give any answer to the question, which was "What relief can you get on this application against the North Eastern?" It seems to me quite plain that he cannot get any. They have not any contract with the applicants, nor do they surcharge them in any way. The utmost that can be said is that the Midland Co. charge Read, Holliday and Sons certain rates which are said to be excessive, when compared with certain rates charged as through rates arranged between the Midland Co. and the North Eastern

Co., but there is no privity, if I may use such a term, in reference to such a statutory obligation, between Read, Holliday and Sons and the North Eastern Railway Co. which enables the Court to give any direct relief against the North Eastern Co. on this application. On principle, therefore, it seems to me that the appellants are right. It cannot, on principle, be right to say that another company against whom I am not in a position to claim anything should be made a party to the proceedings, and that I can say "I will bring them here according to what is said to be the settled practice of the Railway and Canal Commission." We have been referred to two authorities on which Mr. Justice Lush relied, and two only, for the third case does not seem to me to bear upon the point. The first case, *Mapperley Colliery Co. v. Midland Ry. Co.*,¹ is a case which can be passed by, because it was a case of joint rates. The next case does give rise to considerable difficulty. That is the case of *Chance and Hunt v. London and North Western Railway Co.*² In principle, speaking for myself, I do not think that case can be compared with the present one. The facts may be shortly stated: "The applicants complained, *inter alia*, of certain through rates charged to certain competitors in respect of the carriage of goods over the railways of the defendants and other companies from stations on the railway of the defendants to stations on the railways of such other companies, whereby they alleged that such competitors were unduly preferred." The only respondents, the London and North Western Railway Co., for some reason which is not apparent, took out a summons to this effect: either to strike out all reference to other companies or to let them be joined as co-defendants. Mr. Justice A. T. Lawrence referred to *Mapperley Colliery Co. v. Midland Ry. Co.*¹ in the course of the case, and he forced the applicants either to strike out all reference to other

(1) *Ante*, Vol. IX. 147.

(2) *Ante*, Vol. XIII. 286.

companies or to join the other companies. It is put in this way: "It is quite possible that the London and North Western Railway Co. may be charging precisely the same mileage rate in every case. That being so, I am not prepared to say that they are guilty of an undue preference, at any rate unless and until all the parties are before the Court, so that we may see how the rate is compounded in respect of each of the routes in question. Mr. Disturnal contends that as they are in each case the company making the contract, that is enough to make them responsible; but in my view that is not sufficient to lead to the conclusion that they are the company giving the undue preference, if any." Sir James Woodhouse makes a remark which is the one which has given me the most difficulty in this case: "I think in the examination of all these questions of rates, and especially of through rates, the balance of convenience makes it desirable that all the parties concerned in the making of the rates should be before the Court." It is not put upon a legal ground, but upon the balance of convenience. With the greatest possible respect, I do not think that it can be right on the balance of convenience to hold that in every case, even where the applicants themselves do not desire it and protest against it, they should be forced to bring before the Court other railway companies against whom no relief is sought, and against whom no relief, in my opinion, can be sought. I do not think we ought to regard the practice as so established as a rule of convenience that it ought to be acted upon in every case as a matter of course. Applying it to the present case, counsel for the respondents answered a question which Lord Justice Pickford put to him: "What advantage do you propose to get by having the North Eastern Railway Co. added?" by saying "I do not know." That answer seems to me to show that we are not justified in saying that the North Eastern Railway Co. can be, or are, proper parties to an application like this, where an experienced counsel in these matters tells us that he cannot understand

what advantage is to be obtained by having them present. I think we ought to add that it ought not to be an invariable rule of the Railway Commissioners that in every case every company interested in a joint rate, which is said to be evidence of an undue preference against the applicants by one particular railway company, should be before the Court. There may be cases where it is proper to join them, but on the facts of this case I have no hesitation in saying that we should be wrong in keeping the North Eastern Railway Co. here, when every information required to enable the applicants to establish the case can be established and proved either by subpoenaing some officers of the company, or obtaining discovery from the Midland Railway Co. themselves as to the amount they received in respect of the through rate, or by adopting other various modes which an applicant in every case at law has open to him to establish his case. In my opinion this appeal should be allowed.

PICKFORD, L.J.: I agree. This is an application by Read, Holliday and Sons, complaining of undue preference by the Midland Railway Co. It is true technically that in the first prayer they ask for an order directed to the defendants respectively—that is to say, the Midland and the North Eastern Railway Companies—or in the alternative the Midland Railway Co., to desist from undue preference. That is really a complaint of undue preference by the Midland Railway Co. The applicants seek to establish it by the comparison of a rate charged by the Midland Railway Co. in respect of certain traffic from certain collieries to Huddersfield with a rate which is alleged to be charged by both the defendants to certain competitors for traffic from the same collieries to Hull and Middlesbrough. As a matter of fact, it is not charged by the defendants but by the Midland Railway Co. to those competitors, and they are the company with which the contract is made.

It is a through rate, as I understand, established by the

Midland Co. in conjunction with the North Eastern Railway Co. Therefore what the tribunal will have to do will be to ascertain whether a comparison of those two rates, so far as they concern the Midland Co., shows that there has been undue preference by the Midland Co. If there has not been, then there will be no order at all. But I cannot see any combination of circumstances by which there can be an order against the North Eastern Co. Counsel for the applicants entirely failed to convince me by the instances he gave of any combination of circumstances in which such an order should be made. It will, I dare say, be necessary to investigate and perhaps to split up the through rate in order to see what the position of the Midland Railway Co. with regard to it is, as was the case of the North Western Co. in the case of *Chance and Hunt v. London and North Western Ry. Co.*¹ For that purpose it is said that the North Eastern Railway Co. are proper defendants to this application. It seems to me on principle that that cannot be right. It is not the case that a man is a proper defendant to either an application or a writ if no relief of any sort or description can be obtained against him. It is not because he is indirectly concerned and affected by an order that may be made that therefore he is a proper party to the action. Therefore I do not think in principle that the North Eastern Railway Co. are proper defendants to the action. But it was said that it is a regular and settled practice in the Railway Commission that where there is a through rate to be investigated every railway company which is concerned in that through rate must be a party to the proceedings. I am not familiar with the practice of the Railway Commission, and certainly if that were a settled practice, I should not wish to interfere with it. If a practice has once been settled by a tribunal of that description, in my opinion it is a mistake to interfere with it. But I am not satisfied that there is a practice established that in all cases of this kind all the

railway companies concerned in a through rate must be parties to the proceedings. There are some general observations in cases on through rates which show that as a matter of convenience it is proper that they should be before the Court, and I do not in the least wish to say that there may not be cases in which they may be quite proper parties. But I do not see that the two or three cases to which we have been referred establish such a practice. I do not wish to say that they never may be made parties, and I do not say that they must always be parties. There may be cases in which they ought to be parties, but there are cases in which they ought not.

Now what is the state of things in this particular case? The North Eastern Railway Co. object to being parties. Railway companies and individuals do object to being made parties to proceedings with which they have no concern. The applicants, I think, acting upon what they thought was the practice, have joined the North Eastern Railway Co. The applicants can get no order against them, and when they are asked "What is the convenience of your having them here?" they are unable to say that there is any convenience or advantage to them at all. No doubt information may be necessary from the North Eastern Railway Co. That can be got, if necessary, without making them parties. I should think all the information necessary would be got by discovery from the Midland Railway Co., but if not, the information can be obtained from the North Eastern Railway Co. The applicants' counsel is quite unable to point out to us any way in which the Court, or himself, or anybody else, would be convenienceed by the North Eastern Railway Co. being made parties. In this case, I think they ought not to be parties. There are general observations, as I have said, in the case of *Chance and Hunt v. London and North Western Ry. Co.*,¹ which might go to show that they ought in every case to be parties. I do not think that those remarks

go so far as that. If they do go so far as that, I respectfully cannot agree. On the principle of no one being made a party where no order can be made against him, and where the person who has joined him is wholly unable to point out any convenience which is occasioned to any one—either the Court or the parties—I cannot think under those circumstances it can be right and proper that he should be a party, I agree, therefore, that this appeal must be allowed.

WARRINGTON, L.J.: I agree. The real claim made in this case by the applicants is that the Midland Railway Co. are charging them a rate at such an amount, and are charging their competitors a rate at such an amount as result in the Midland Railway Co. giving an undue preference to their competitors. That claim involves a comparison of the treatment which the Midland Railway Co. metes out to the applicants and the treatment which the same company metes out to competitors. Otherwise it seems to me impossible for the applicants to establish that the Midland Railway Co. is guilty of the offence under the Railway and Canal Traffic Act, 1854, of giving an undue preference to one person over another. It happens, however, that the rate which the Midland Railway Co. is charging to the competitors is part of a through rate, in which through rate the North Eastern Railway Co. is interested; and the applicants have, in deference to what they think is the practice of the Railway Commission, joined the North Eastern Railway Co. as a defendant to these proceedings. The North Eastern Railway Co. say: "We are not giving undue preference to any one over you, for we have no dealings with you." I think I am right in saying that under no circumstances in these proceedings could the applicants obtain any relief against the North Eastern Railway Co. The North Eastern Railway Co. say: "We do not want to be made defendants. We ask to have our name struck out," and in principle it seems to me that they are right.

I have read the words in the application which purport to

ask for relief against both the railway companies, but in fact no relief is sought against the North Eastern Railway Co., and on principle I should have thought it was unquestionable that they should not be made parties. But it is said that there is a general and established practice of the Railway Commission which amounts to this: that wherever a through rate, under whatever circumstances, comes to be discussed, then all the companies which are parties to the through rate ought to be parties to the proceedings. In my opinion, no such practice has been established. The two cases which have been referred to do not establish any such general practice at all.

Then one has further to consider this: if the only suggestion is convenience, one has to find out whether there is any substance in the alleged convenience. Counsel for the applicants, in answer to a question put to him by Lord Justice Pickford, says he cannot say it will be any convenience to him to have the North Eastern Railway Co. there. If the applicants cannot say what convenience to them it would be to have the North Eastern Railway Co. there, any argument founded on convenience seems to me to disappear altogether. I am far from saying, even if they were in a position to contend that it would be convenient to them to have the North Eastern Railway Co. there, that that would be sufficient ground for making a person party to a litigation with which he has nothing to do, and in which no relief can be asked against him. I agree that the appeal ought to be allowed.

Solicitors—Van Sandau & Co., agents for Mills & Co., Huddersfield, for the applicants; R. F. Dunnell, for the North Eastern Railway Company.

MOLD AND DENBIGH JUNCTION RAILWAY
CO. v. LONDON AND NORTH WESTERN
RAILWAY CO.¹

Working Agreement—Obligation to Develop Traffic—Shortest Route—Duty of Working Company—Public Convenience—Railway and Canal Traffic Act, 1888, s. 15.

July 7, 8, 9, 12, 13. October 25, 1915. April 10, 12, 1916.—By an agreement scheduled to an Act of Parliament the defendants undertook to work, manage, and keep in repair the railway of the applicants for the purposes of all traffic thereon, and were to work such traffic in a proper and safe manner so as fully and in good faith to develop the traffic to be served by the railway.

The applicants complained that the defendants though acting in good faith had failed to work the railway so as to fully develop the traffic and in particular had failed to carry traffic over the railway in cases in which the railway formed the shortest route. The applicants asked accordingly for (1) an order that the defendants do work the applicants' railway so as fully and in good faith to develop the traffic to be served by the railway; and (2) an order that the defendants desist from preferring their own route where the applicants' route was the shortest or most convenient:—

Held, by the COURT OF APPEAL, affirming the Commissioners, that there was no obligation to send traffic over the railway where that formed the shortest route, and that the defendants had done all that they were bound to do under the agreement by working the railway in such a manner as, having regard to the exigencies of railway traffic, was best for the public convenience. The application was therefore dismissed.

This was an application under section 15 of the Railway and Canal Traffic Act, 1888, for an order that the defendants should carry out the provisions of a working agreement.

The applicants were the owners of a local railway in North Wales connecting at both ends with railways of the defendants. In 1868, when their railway was under construction, the applicants, desiring to avoid the necessity of providing rolling stock of their own, entered into a working agreement

(1) Before Lush, J., and Commissioners the Hon. A. E. Gathorne-Hardy and Sir James Woodhouse, sitting at the Royal Courts of Justice, London.

with the defendants under which it was agreed (*inter alia*) that the defendants were to have the sole right of working the railway and were to work the traffic in a proper and safe manner so as fully and in good faith to develop the traffic to be served by the railway.

Upon completion of the railway the defendants took possession of it and worked it under the agreement, and they had been in sole control of it from that date. The applicants found that over a long series of years their receipts remained practically stagnant though traffic on other lines in North Wales had greatly increased, and they came to the conclusion that the defendants were not fulfilling their obligations under the agreement. They did not allege bad faith on the part of the defendants, but they contended that the defendants had taken a wrong view of their duty. They appointed a canvasser to visit the district and try to secure traffic, but the defendants threatened to evict him as a trespasser if he came on the railway, and contended that they had the sole right to control the working. They denied that they were under any obligation to utilise the applicants' railway in cases in which it happened to be the shortest route, and they claimed the right to send traffic by any route they thought fit, even when the consignor had specially consigned it over the applicants' railway. They said that it was their regular practice to ignore the directions of consignors on their own railway when it was not convenient to observe them, and they contended that under the agreement all they were bound to do was to treat the applicants' railway as they would have treated it, if it had been part of their own system, and in good faith so to use it as to best serve the interests of the public.

The agreement was set out at length in Schedule B to the London and North Western Railway Company's Act, 1869 (32 & 33 Vict. c. cxv.), and the material sections of it were as follows :

Article 3. The word "traffic" wherever hereinafter employed shall, where the context permits, mean and include

all passengers, small parcel, animal, goods, mineral, and other traffic of any description whatsoever conveyed by the North Western Company on the railway or any part thereof.

Article 4. The Mold Company will, as soon as can be, complete the railway . . . to the reasonable satisfaction of the engineer of the North Western Company, and so that the railway shall be approved by the Government inspector of railways as being in all respects fit to be opened and used for public traffic.

Article 8. On and for ever after the opening of the railway for public traffic the North Western Company may and will work manage maintain renew and keep in good order and repair the railway and the works and conveniences thereof for the purposes of all traffic thereon, and will work such traffic in a proper and safe manner so as fully and in good faith to develop the traffic to be served by the railway.

Article 9. The North Western Company will employ and provide all such . . . workmen and servants and all such . . . rolling stock plant stores materials and labour as shall be proper and sufficient for the working of the railway by the North Western Company . . . and the Mold Company shall not be bound to employ or provide any such persons or things.

Article 10. So far as from time to time lawfully may be, the North Western Company shall on and for ever after the opening of the railway for public traffic have, exercise, and enjoy for the purposes of the working by them of the railway all the rights powers authorities and privileges whatsoever both present and future of the Mold Company with respect to the regulation management and working of the railway as fully and effectually as if the railway were part of the London and North Western Railway.

Article 11. The Mold Company will abstain from at any time being, or directly or indirectly acting as, carriers on the railway or any part thereof, and from being in any manner concerned with any company or person (other than the North Western

Company according to this agreement) in carrying on the railway or any part thereof, and from doing or concurring in anything which might directly or indirectly interrupt impede or interfere with or in any way disturb the user or enjoyment by the North Western Company of any of the powers and privileges intended to be secured to them by this agreement, and shall not grant running or any other powers to any other company or person.

Article 17. The North Western Company shall pay to the Mold Company the total amount of the following sums, that is to say—

First, one half of the gross receipts of the North Western Company for local traffic on the railway and one half of the mileage proportion due to the Mold Company of the gross receipts . . . of all tolls rates and charges from time to time received by the North Western Company for traffic partly on the railway and partly on their own or any other railway or railways.

Secondly, one half of the Mold Company's mileage proportion of the gross receipts of the North Western Company for all traffic carried by the North Western Company between any place on the Mold branch of the North Western Company, the Ffrith branch, and the Mold and Minera branch, on the one hand, and Denbigh and all places on the Denbigh Ruthin and Corwen Railway and all places on the Vale of Clwyd Railway south of the main line of the North Western Company at Rhyl, on the other hand, whether such traffic be conveyed by the North Western Company over the railway or over any other route.

Thirdly, one fourth of the Mold Company's mileage proportion of the gross receipts of all traffic (carried by the North Western Company) arising or terminating at or passing through Chester to or from Denbigh and all places on the Denbigh Ruthin and Corwen Railway and all places on the Vale of Clwyd Railway south of the main line of the North Western Company at Rhyl, whether such traffic be conveyed

by the North Western Company over the railway or over any other route.

Article 24. The North Western Company will agree to a system of through booking, through invoicing with through rates and fares and equal mileage division for all traffic between the railway and the Wrexham Mold and Connah's Quay Railway, the Denbigh Ruthin and Corwen Railway and all places on the Vale of Clwyd Railway south of the North Western main line at Rhyl, and will afford all reasonable facilities for the conveyance of such traffic.

The agreement also provided that any difference arising thereunder should be determined by arbitration under the Railway Companies Arbitration Act, 1859, but no arbitrator had been designated.

Leslie Scott, K.C., Lynden Macassey, K.C., and F. T. Barrington Ward (for A. Moon, serving with His Majesty's Forces), for the applicants:

Express words imposing the obligation to send by the shortest route are unnecessary; the effect of Article 8 of the agreement is that the defendants must use the applicants' railway wherever that forms the shortest route, unless there is some specific reason in a specific case for their not doing so. Other things being equal, the fact that a route is the shortest is the dominant factor. Article 8 does necessarily include within it an undertaking to send traffic over the applicants' railway; traffic is not developed if all traffic is sent by another line and a money payment is made instead. And if some traffic must be sent over the railway, the natural traffic to be sent is that for which it offers the shortest route.

G. J. Talbot, K.C., W. J. Disturnal, K.C., and Bruce Thomas, for the defendants:

The defendants' view of their obligation under the agreement is that they are bound to treat the applicants' railway in every respect as if it was part of their own system. There is not a word in the agreement as to sending traffic over the shortest route; there is nothing to oblige the defendants to

send any traffic whatever over this line except in so far as may be necessary for developing traffic to and from places actually situated on it.

LUSH, J.: The applicants complain that the defendants have committed breaches of an agreement entered into between the parties on November 12, 1868, by which the defendants undertook to manage and maintain the applicants' railway, and to work the traffic on such railway "in a proper and safe manner so as fully and in good faith to develop the traffic to be served by the railway." They claim damages and an order to prevent future breaches.

The facts are shortly these: The applicants' railway runs from Denbigh to Mold, where it connects with a branch line of the defendants from Mold to Mold Junction on the defendants' main line of railway through Chester to Holyhead. At the time the agreement was entered into the defendants owned the line from Rhyl to Denbigh (the Vale of Clwyd Railway) which is a single line, and also owned the railway running in continuation of that railway from Denbigh to Corwen (the Denbigh, Ruthin, and Corwen Railway). The applicants' railway therefore is connected at both ends with railways owned and worked by the defendants. The substance of the complaint was this: The applicants said that for very many years the defendants had not developed their line in accordance with their undertaking. So far as the passenger traffic was concerned, the complaints as to the present working were of a trivial and indeed negligible character, but so far as the goods traffic was concerned it was said that not only were insufficient trains run, but the bulk of the traffic coming from stations below and above Denbigh and on the main line west of Rhyl and destined for Mold and stations near Mold (and corresponding traffic the other way), instead of being conveyed by the short route between Denbigh and Mold, were carried by the defendants' main line *via* Mold Junction and thence to Mold. The complaint was, not so

much that the applicants lost their proper share of the gross receipts (the agreement contains a provision as to that which I will point out in a moment), as that the convenience of the short route was not properly brought to the notice of the public, and local traffic was not properly encouraged, and the railway did not get that advertisement which it would have had, if traffic had gone by the short route. The line, it was said, was "starved" and made a merely subordinate line of the defendants. The applicants have certainly allowed a very long period to elapse before formulating their complaint, but this fact, of course, does not debar them or disentitle them to relief if they have established their right to it. We have to say whether they have established it in fact.

Now the real question which we have to decide is, in my view, this: The defendants do not dispute that they have worked the line as if it were a branch line of their own. They say that they have worked the traffic passing between the places I have mentioned by the most convenient route having regard to the facilities at their disposal—exchange sidings, and facilities of that kind—and that this involves taking it mainly, or at all events, partly, by the longer route *via* Mold Junction. Their case is that so long as they exercise an honest judgment as to the most convenient mode of working the traffic, they are entitled to act as they have done under the agreement. It was not suggested before us that the defendants have acted in bad faith. This was very clearly and very properly on the evidence disclaimed by Mr. Leslie Scott. His case really was that the defendants have misconceived their obligations, and the duty which they owe to the applicants under the contract, and that they are bound by the contract to develop the applicants' railway as if it were a separate and competing line for the advantage of the shareholders, and not entitled to treat it as if it were one of their branches, the traffic on which should be worked in connection with their system in the most convenient way having regard to the interests of the public. An attempt was made to prove

that certain places on the applicants' railway were ignored or kept in the background in the defendants' publications, and also that several of the stations were omitted from the list of stations where cheap bookings were offered, but this broke down. The real question, I think, is, What is the nature and extent of the obligations which the defendants undertook by the contract?

Now the contract commences with a recital that the applicants' railway "could be worked by the North Western Company more conveniently and with greater advantage to the public" than by the applicants. After provisions for the taking of the necessary steps to make the contract effective and for the completion of the railway, and other matters, comes the stipulation for developing the railway, which I have already quoted and other incidental provisions. There is a provision that the defendants shall work the railway "as fully and effectively as if the railway were part of the London and North Western Railway" and for protecting the defendants from interference by the applicants. Then follow terms as to the rates to be charged. Article 17, which is an important clause, provides that the defendants shall pay to the applicants (1) one-half of the gross receipts for local traffic on the railway and one-half of the mileage proportion due to the applicants of the gross receipts (subject to certain exceptions) of all tolls and rates received by the defendants for traffic partly on the applicants' railway and partly on their own or other railways. (2) One-half of the applicants' mileage proportion of the gross receipts for all traffic carried by the defendants between any place on the Mold branch of the defendants, and certain other branches on the one hand, and all places on the Denbigh, Ruthin, and Corwen railway, and all places on the Vale of Clwyd railway south of Rhyl on the defendants' main line: "whether such traffic be conveyed by the North Western Company over the railway (*i.e.*, the applicants' railway), or over any other route." Then follows a similar provision (except that the applicants' share is to be

one-fourth) in respect of traffic arising or terminating at or passing through Chester to or from Denbigh and all places on the two railways running north and south through Denbigh as before-mentioned, whether such traffic be conveyed by the defendants over the applicants' railway or not. The only other clause I need mention is Article 24, by which the defendants agreed to a system of through booking and equal mileage division for traffic between the applicants' railway and the two railways through Denbigh as before-mentioned and another railway, the Wrexham Mold and Connah's Quay railway . . . and agreed that they would "afford all reasonable facilities for the conveyance of such traffic."

Now it is impossible, I think, to read this agreement without seeing that the defendants were to work the railway in question in connection with and as part of their own system, and not to treat it and develop it as a separate and competing railway. Not only did they not agree to convey all traffic from other railways over the applicants' railway whenever that route was the shortest route, but they expressly stipulated for payment under certain conditions of half or quarter of the gross receipts to the applicants if it was carried by the other route, thereby implying that they were under no such necessary obligation. To say that their duty was and is to work the applicants' railway as if it were a line competing with their own as opposed to a line worked in connection with their own railway, seems to me impossible on the true construction of the contract. Their obligation to develop it, in my opinion, means this, that while working it as a branch of their own system, they are not to capriciously keep traffic off the line and divert it for their own benefit when, having regard to convenience in working, the natural and convenient mode of working it would be to send it by the applicants' railway. They are to develop in good faith the traffic which, in the ordinary course of working this branch line in connection with their other railways, would properly and naturally be served by the railway. That, I think, is the

meaning of the expression "traffic to be served by the railway."

Now that being the bargain between the parties, and no suggestion of bad faith being made by counsel, or substantiated if it had been made on the evidence, how does the case for the applicants stand? On the main question I am satisfied that the traffic which is conveyed by the longer route is so conveyed because it is more convenient to do so; because it can be more easily and conveniently, and, indeed, often more expeditiously dealt with, and not because the defendants desire to "prefer" their own line. It is true that the service of goods trains by the Mold to Denbigh route is not very frequent, but the defendants' evidence, which I see no reason to question, was that it was adequate. Complaint was made by certain traders, mainly cattle dealers, that when cattle, for example, are specially consigned by the short route they are sent by the longer one. Now one can quite imagine that a refusal to deal with traffic in accordance with the directions of traders might be so frequent and so systematic as to afford evidence of an intention to "prefer" another route, and not to deal fairly with a particular line in such a case as the present, but as I have said, bad faith was not imputed, and the evidence falls far short of establishing any such inference.

There are one or two minor matters which I ought perhaps to mention. The applicants contended that in supporting a scheme for making a new short line of railway connecting their main system near Holywell with a district near to the applicants' railway, the defendants were committing a breach of the agreement. There is, in my opinion, no foundation for such a contention.

An attempt was also made to prove that an insufficient supply of wagons was provided, but on the witnesses' own statements, whatever ground of complaint might once have existed, it has some time ago been remedied. It appears also that there has been some room for greater care in checking the route by which holders of "optional" tickets travelled,

but that is merely matter of account and calls for no interference by this Court.

With regard to the main question in dispute, I fail to see how it can be said that the applicants have established any breach of contract by the defendants. In my view, on the true construction of their contract, the defendants were intended to have, within the limits of honest management, a wide discretion as to the mode in which this line should be worked. That they have managed it honestly is conceded, and in my opinion they have not exceeded the limits of the discretion entrusted to them. I, therefore, think that the application fails, and should be dismissed.

HON. A. E. GATHORNE-HARDY: The applicants complain that the defendants have failed to carry out their agreement to work their line "so as fully and in good faith to develop the traffic to be served by the railway." They ask us to determine that this agreement has been broken, and to make a mandatory order that it shall be properly carried out.

These applications against companies working short lines of independent railway under statutory agreements are always difficult and complicated. The present one presents one feature of novelty. In no previous case has so long a time been allowed to elapse before complaint of any breach. The defendants have worked the line ever since 1869, a period of more than forty years, and when on April 17, 1912, their representative, Sir Frank Ree, wrote to the applicants' secretary "that he was not aware that it had ever been suggested that we have in any way failed to comply with the conditions of the agreement," he received the answer "that it is impossible at the present time to state whether there may or may not be grounds for such an assertion." However, the applicants are not to be prejudiced by the length of time that has elapsed before their application. They were disappointed at the rate of progress disclosed by the traffic figures, and in November, 1911, they appointed a traffic inspector, Mr. Hay,

who has given evidence before us, and collected a number of complaints which have been investigated in this Court, from which it is sought to establish what is known as a "cumulative case." One after another they "melted," to use the expression of counsel, in the course of the investigation, being either abandoned or explained, and all imputations of bad faith were, from the outset, very properly disclaimed by the applicants' counsel.

The "cumulative case" entirely failed, and the sole point that remained for our consideration at the conclusion of the evidence was whether the defendants had failed in their duty by adopting and acting upon a wrong construction of the agreement and of their obligations thereunder. The point seems to me to be clearly put in some interlocutory observations of Mr. Justice Lush when he said: "Does the contract mean that the applicants are to be at liberty to send the traffic whichever way they find most convenient provided they act in good faith? and it is not suggested that they have not. Are they to be at liberty to send the traffic by the route they find most convenient provided they comply with Article 17 as to payment? Or does it, on the other hand, mean that they are to develop this as a separate entity, a separate undertaking, and to convey goods by this line if this were the natural line by which they would be conveyed if it were an independent undertaking?"

This brings me to the consideration of the precise words of the agreement which seems to me to have been very carefully drafted, and to be more easy of interpretation than many which have been brought into our Court. If we consider the position of the parties at the time of negotiation, the defendants had at that time routes of their own by which traffic was passing which could also be conveyed by the new line with which they were asked to make a working agreement. The applicants had to choose between embarking on competition with a powerful opponent with all its disadvantages

and risks, or leaving the working in their hands, protecting themselves against loss by the terms and conditions of the working agreement. The defendants had to pay a price for a working agreement, with the advantages of avoiding unnecessary competition, and opening out a new district. It is difficult, as Mr. Talbot pointed out in his able argument, to see any adequate motive for their undertaking to convey traffic by the new line wherever it formed the shortest route, or in other words to make it not only competitive, but to hand over to it by agreement, a complete advantage in the competition, and I could not read this obligation into Article 8 even if it stood by itself. But when we examine the terms of Article 17, and consider the knowledge and position of the negotiating parties at the time the agreement was entered into, its meaning seems perfectly clear. The then representatives of the applicants knew of the position of the large exchange sidings near Mold, they knew that the line north of Denbigh was single; that Forydd was not a convenient point for exchange, and that facilities for the marshalling and exchange of goods traffic had not been to any large extent provided on their own new line. From this they must surely have drawn the inference that a large proportion of the goods traffic would probably, for purposes of convenience, be carried over the existing routes, and they therefore protected themselves against loss by money payments under clauses 2 and 3 of Article 17. Clause 2 runs as follows: "One half of the Mold Company's mileage proportion of the gross receipts of the North Western Company for all traffic carried by the North Western Company between any place on the Mold branch of the North Western Company, the Frith branch, and the Mold and Minera branch on the one hand and Denbigh and all places on the Denbigh Ruthin and Corwen railway and all places on the Vale of Clwyd railway south of the main line of the North Western Company at Rhyl, on the other hand, whether such traffic be conveyed by the North Western Company over the railway or over any other route."

Clause 3 deals with traffic of more distant origin or destination. They are to receive for such traffic: "One-fourth of the Mold Company's mileage proportion of the gross receipts of all traffic carried by the North Western Company arising or terminating at or passing through Chester, to or from Denbigh and all places on the Denbigh Ruthin and Corwen and all places on the Vale of Clwyd railway south of the main line of the North Western Company at Rhyl whether such traffic be conveyed by the North Western Company over the railway or over any other route." It is impossible to believe that the defendants would have agreed to make these money payments when the applicants' line was not in fact used, and would then, in addition, have accepted an obligation to convey traffic over the applicants' line whenever it formed the shortest route. I do not read these provisions as a licence to convey all traffic by other routes. To leave the applicants' line derelict would not be to act *bonâ fide*; but I interpret them to mean that as long as the North Western Co. acted *bonâ fide* and in the interest of the convenient working of traffic, the convenience both of traders and of the working line being considered, they were to have a free hand in the selection of the route to be traversed.

On this interpretation of the agreement I am unable to find from the evidence that they have at all failed to fulfil their obligations. I, therefore, think that the application should be dismissed.

SIR JAMES WOODHOUSE: The applicants own a short line of railway between Mold and Denbigh, which connects at Mold with the defendants' branch line to Chester, joining the main line to Holyhead at Mold Junction. It also connects by a junction near Denbigh with the Vale of Clwyd railway running north to Rhyl, and with the Denbigh, Ruthin and Corwen railway running south to Corwen. Both these railways belong to the defendants. At or about the time of the con-

struction of the applicants' railway in 1868 the defendants entered into an agreement for its exclusive user and working on certain agreed terms. After the lapse of 45 years the applicants now complain that the defendants have failed to fulfil their obligations, first by not fully and fairly developing the traffic on their railway, and secondly by not making all the payments stipulated for in the agreement.

We have had a good deal of evidence relevant and irrelevant, as to the facts bearing upon these allegations, but in my judgment the answer to the main questions in issue depends entirely upon the proper interpretation to be placed upon the agreement. The parties made a business bargain, and to understand what the bargain was, I think that it is not only useful, but essential, to look at the position of matters at the time it was entered into. The applicants by their new line between existing termini with direct access hoped to open up a certain new area for local traffic. The line also afforded a shorter route for through traffic than the existing routes by which traffic then travelled entirely on the defendants' system. It is obvious that what would best serve the applicants' interests would be the user of this route for through traffic whenever it was the shortest route, and I cannot doubt that they did try to negotiate a bargain on this basis, but failed to accomplish it. They contend before us now that this is the obligation which the agreement imposes upon the defendants, and their whole case really hangs upon this view. I am unable, however, to adopt it. The agreement recites that it is entered into because it could be worked by the defendants more conveniently and with greater advantage to the public than by the applicants. The considerations of convenient working and public advantage are there placed in the forefront of the agreement. By Articles 10 and 11 the defendants are to have sole and absolute control of the line and to work it as fully and effectually as if it were part of their own system, including the fixing of the rates and charges. I interpret this to mean that so long as the de-

fendents work the line as part of their entire system in the most convenient manner, having regard to all the circumstances for the public advantage, with good faith towards the applicants (which is not here impugned)—that is the extent of their obligations as to working. This is the view upon which the defendants have acted, and looking at the agreement as a whole, I think it is a sound view. Not only is there no express obligation upon the defendants to forward traffic by the applicants' line, whenever it is the shortest route, but I think any such implied obligation is negatived by the express provisions of Article 17 giving the applicants a fixed mileage proportion of the gross receipts less terminals on the through traffic carried by alternative routes. I think this provision emphasises the view that how this line could be best used for working the traffic in the ordinary and natural course was left to the practical judgment and experience of the defendants exercising their discretion always, as I have said, in good faith.

The agreement requires the defendants to so work the traffic as to fully develop the traffic to be served by the applicants' railway. The applicants say that this means that the defendants must send the traffic by the shortest route under all circumstances. I cannot so interpret it. I think the agreement means that the defendants, using the line as part of their own system, are to work over it such traffic as they would in the natural course of working it in connection with their other railways, having regard to the shorter haulage it affords, to the general volume of traffic, to the better facilities and convenience of exchange on the older routes, and to all the surrounding circumstances, send over it if it were their own absolute property. This is the traffic which it would conveniently and naturally serve. The determination as to this is in their discretion, so long as they exercise an honest and fair judgment, which it is admitted they have done.

This being, in my opinion, the measure of the defendants' obligation, I can find nothing in the evidence which satisfies

me that they have failed to act up to it, and for these reasons I agree that the application fails and must be dismissed.

G. J. Talbot, K.C. : I ask for costs in this case. As the Court knows by the Act of 1894 the discretion of the Court as to costs is controlled in cases not between Railway Companies, where it is provided that costs are not to be given unless the application or the answer, as the case may be, is frivolous or vexatious. In this case, I submit there is no reason why the costs should not follow the event according to the practice of the High Court, and according to the practice of this Court in all cases in which they are not specially fettered by the Act of Parliament.

Lynden Macassey, K.C. : The Court is here acting as Arbitrators under the agreement between the parties, and in a matter of this sort, touching a question of the construction of the agreement, the Court would not award costs. There was a perfectly *bonâ fide* attempt here to obtain the view of the Court upon what is the precise relationship in law between the parties, and it is not a case which should be visited with costs.

Lush, J. : We think, on the whole, that there was a fair question to be argued, and therefore we do not propose to make any order as to costs.

The applicants appealed.

Leslie Scott, K.C., and *F. T. Barrington Ward* (for *A. Moon*, serving with His Majesty's Forces) appeared for the appellants.

G. J. Talbot, K.C., *W. J. Disturnal, K.C.*, and *Bruce Thomas*, for the respondents, were not called upon.

LORD COZENS HARDY, M.R.: This is an appeal from a decision of the Railway and Canal Commissioners, who have held that there has been no breach by the London and North Western Railway Co. of a contract which was entered into in the year 1868, between the London and North Western Railway Co. and the Mold and Denbigh Junction Railway Co. I am so completely satisfied with the arguments of the Commissioners that I really hesitate to spend much time in dealing with the case, but it is right that I should, quite shortly, state the grounds upon which I base my judgment.

It seems to me to be a case which turns solely and entirely upon the terms of the contract itself. We have nothing whatever to do with subsequent legislation, or any alleged rights which might exist, had this agreement of 1868 never been executed; that is to say, rights which might have existed under the Acts of 1873, or 1888, or 1894, or any other subsequent legislation.

Now, what was the subject-matter with which this agreement dealt? The applicants were the undertakers, who made a railway of some 15 miles in length in a very peculiar position. It is a line which has no station of its own at either end. It is a line which is, at present, I may say, surrounded by lines of the London and North Western Railway, and which, at the date of 1868, was also surrounded, to a large extent, by lines which were either owned by, or, at least, worked by, the London and North Western Railway. For a very obvious reason such a railway as this was could not really be worked to the advantage of the public and the trading community except by its powerful neighbour, the London and North Western Railway Co. Parliament then sanctioned this agreement upon which alone the rights of the applicants here must depend.

The agreement which has been sanctioned by Parliament begins in this way: "Whereas the railway of the Mold Company could be worked by the North Western Company more conveniently, and with greater advantage to the public than

by the Mold Company." Then it says that the companies have agreed to make the following agreement which, as I say, has been sanctioned by Parliament. In order to interpret this agreement one must look with some care at a few clauses of it. Article 1 provides that the North Western Co. will apply for Parliamentary sanction to the agreement; that sanction was obtained. Article 2 defines what the word "railway" means; it means "the Mold and Denbigh Railway from Mold to the Junction with the Vale of Clwyd Railway at a point near Denbigh." Article 3 is a very important clause; "the word 'traffic' wherever hereinafter employed shall, where the context permits, mean and include all passengers, small parcel, animal, goods, mineral, and other traffic of any description whatsoever conveyed by the North Western Company on the railway or any part thereof." That is not an ordinary or common form definition clause. It is not "shall include," but the words are "shall, where the context permits, mean and include" the traffic passing on the railway. Then we come to a provision as to completion of the railway, which was not then quite completed. Nothing further turns, I think, upon the agreement until we come to Article 8, upon which, in my view, the decision in this case really depends: "On and for ever after the opening of the railway for public traffic the North Western Company may and will work, manage, maintain, renew, and keep in good order and repair the railway"—we know what that means by the definition—"and the works and conveniences thereof for the purposes of all traffic thereon"—that word seems to me plainly to mean what is covered by Article 3, and nothing else—"and will work such traffic"—that, again, means and imposes the obligation to work traffic on that line—"in a proper and safe manner, so as fully and in good faith to develop the traffic to be served by the railway." Now, as I read that clause, that imposes these two obligations on the company: The company must "work, manage, maintain, renew, and keep in good order and repair the railway and

the works and conveniences thereof for the purposes of all traffic thereon, and will work such traffic in a proper and safe manner," the result of which seems to be this, that they will work the traffic in such a manner "so as fully and in good faith to develop the traffic to be served by the railway." It is not an obligation imposed upon the company to develop the traffic in any way whatever, but it is merely that the company is to do these two specific things in such a manner in good faith that they will develop the traffic to be served by the railway. What is the meaning of the words "traffic to be served by the railway"? *Prima facie*, in this context it seems to be to mean traffic originating on or in the conduct of the railway itself, including fresh traffic which would arise in normal circumstances by works, and so on, in the immediate neighbourhood of the line, either north or south of it, and which would therefore be traffic to be served, and necessarily to be served, by the railway. I do not think it is a fair, natural or proper meaning of that Article 8 to say that it applies to traffic which may be coming, say, from Anglesey, or round the coast, or anywhere else, and going to the east beyond Chester, or anything of that kind. I think that the section has not the meaning or effect upon "develop the traffic" in the large and wide sense which Mr. Leslie Scott has urged upon us.

Any doubts which may have arisen upon that seem to me to be removed when you look at Article 17. Article 17 might not suffice to cut down the plain and unambiguous language used in Article 8, but I think you are bound in considering Article 8 (assuming it to be as it is in some respects rather obscure), to look at Article 17 to see in what respect they correspond. Article 17 provides for payments which are to be made. First, the North Western Co. are to pay "One-half of the gross receipts of the North Western Company for local traffic on the railway, and one-half of the mileage proportion due to the Mold Company of the gross receipts (except as hereinafter mentioned) of all tolls, rates

and charges from time to time received by the North Western Company for traffic partly on the railway, and partly on their own or any other railway or railways." That, again, seems to deal with traffic as to which there may be a necessity of apportioning the total charge by reference to mileage or otherwise. For instance, if goods are sent from any station on the main line, say from Bagillt, to a station on the Mold Railway, say Rhydymwyn, there will have to be an apportionment between what is due to the London and North Western Co. for its part of the through traffic, and what is due to the Mold Co., just the same as if traffic comes from the Great Central Railway, a line which goes from Connah's Quay south. Then there is a second provision: "One-half of the Mold Company's mileage proportion of the gross receipts of the North Western Company for all traffic carried by the North Western Company between any place on the Mold Branch of the North Western Company, the Ffrith Branch and the Mold and Minera Branch, on the one hand, and Denbigh and all places on the Denbigh, Ruthin and Corwen Railway, and all places on the Vale of Clwyd Railway south of the Main Line of the North Western Company at Rhyl, on the other hand, whether such traffic be conveyed by the North Western Company over the railway or over any other route." That is to say, it contemplates that certainly as to those particular railways the London and North Western Railway have a right to send the traffic by other routes, but in that case they are to pay one-half of the Mold Co.'s mileage proportion, just as they take a mileage proportion. There is a similar provision in the third clause as to the North Western traffic, giving one-fourth of the mileage proportion.

The argument on behalf of the appellants here has been that there is, if not an express obligation in Article 8, at least an implied obligation that they will send over this particular line of railway, the Mold Railway, all goods traffic, or all traffic in respect of which that is the nearest or shortest

route, and that they will do that although for public convenience, and for marshalling and dealing with the traffic, it is much more to the public advantage and to the advantage of traders to go a longer mileage, because you have a better permanent way, and better arrangements for dealing with the trucks and matters of that kind. I can find no such implied obligation as that. I think that the London and North Western Railway Co. having, as it is admitted they have, acted for 45 years under this agreement in good faith and worked the railway in such a manner as, having regard to the exigencies of railway traffic, is best for the public convenience, they have performed all their obligations to the Mold Railway Co.

I only mention this in order to show that I have not forgotten it. I observe from the judgment of Mr. Justice Lush that he seems to have thought that Article 10 by itself treated this Mold Railway as being worked as fully and effectually as if it were part of the London and North Western Railway system. I do not attach that meaning to Article 10. But Article 10 does not seem to me to be in the least adverse to the contention of the North Western company, and without reference to Article 10, treating this merely as a contract between the parties, I feel no hesitation in saying that the Commissioners were perfectly right in the view they took and that this appeal must be dismissed.

PHILLIMORE, L.J.: I am of the same opinion. Subject to the criticism which, it seems to me, was justly administered to Mr. Justice Lush's application of Article 10, I have not discovered in the reasonings of the Commissioners in the Court below anything which seems to me unsound, or any argument on which I should not be prepared to base my own judgment. There seems to me to be only three Articles of importance to consider in this matter. Those are Articles 8, 17, and 24 of the agreement. Article 8 is, I think, primarily a repair clause. The quasi lessor company

have to start the railway with all its appliances in good order and well constructed, and then the quasi lessee is to maintain, renew and keep in good order and repair the railway for the purposes of all traffic. Then this is something additional. He is to work such traffic in a proper and safe manner—the construction of the word "safe" shows partly what the intention is—"so as fully and in good faith to develop the traffic to be served by the railway." Now what traffic is he to work? He is to work that traffic which is referred to in Article 3, there being no reason for saying that the context makes that impossible, that is to say, he is to work the traffic which comes on the Mold and Denbigh railway, and he is to work that traffic in a proper and safe manner, and so as fully and in good faith to develop the traffic to be served by the railway.

Now, if I may express a shade of difference with that which the Master of the Rolls has said, I am not at the moment prepared to limit the traffic to be served by the railway to the traffic which actually comes straight upon the railway from quarries or collieries or industrial works side by side with it: I am not certain that it need be limited to that, and I will put my judgment in this way. For the purposes of my judgment I will assume that the traffic to be served by the railway includes through traffic as well as local traffic, but even if the traffic to be served is through as well as local, the only development of that traffic, whatever it is, is such development as will be procured by good and safe working of the traffic which comes on the railway. There is no contract to do anything else than that. They are to work that traffic which they have to handle on this railway in a proper and safe manner, so as not to discourage traffic coming on the railway. That is what seems to me to be the sense of Article 8. Then Article 17 is the redendum clause. First of all, they are to pay half the gross receipts of what travels on their line; secondly, they are to pay half certain gross receipts, whether that traffic comes on their line or by any

other route—no inducement to the North Western Co. to send traffic by another route, because, if they do, they will have to pay the same, and there will be no wear and tear of the Mold Co.'s line; and thirdly, they are to pay a quarter of certain other traffic whether it be conveyed by the North Western over this railway or not—contemplating the fact that it may be quite immaterial whether the traffic goes through this railway or on this railway or by some other railway, because in either event the North Western are to pay. Then there comes Article 24. Article 24 seems to me to superimpose some additional duty upon the North Western Railway. They are to encourage, and specially to encourage, traffic, not, as I first thought, between two cross railways over this railway, but traffic between this railway and the two railways which run, roughly speaking, at right angles to it to the east and west, one of which does not directly join, but only joins through a portion of the North Western line, and the other of which is now North Western, and may have been contemplated wholly or in part as about to be North Western, but which was not North Western actually at the moment when this agreement was made. As it seems to me (not having heard the respondents to the contrary), on the appellants' case, there seems to be some additional burden imposed on the North Western Co. by Article 24; at any rate, I assume it for the purposes of this judgment; but if that be so, it rather strengthens the contention that no similar burden is imposed by Article 8. Under Article 8 they are to work that traffic which comes upon the line in an encouraging and not a discouraging manner. They are, by Article 17, to pay for the traffic that comes on the line and for traffic which might come along the line, but in fact is carried for convenience round another way, on certain terms; and by Article 24 they are to afford special facilities for a specially restricted form of traffic. When that is said, all is said that has to be said in this matter. Good faith is assumed and found, and, the good faith being

assumed and found, and no breach of contract on the part of the North Western Co. being proved, I think the decision is right and should be affirmed.

SARGANT, J.: I am of the same opinion. It seems to me that Article 8, which was undoubtedly the crucial article, here divides itself naturally into two parts, the first part occupied mainly, if not exclusively, with the maintenance, and the second part occupied with working. I should myself be inclined to apply the words "so as fully and in good faith to develop the traffic to be served by the railway" to the second part of the article only, and not to both parts, but, whichever construction is adopted, it seems to me that, having regard to the narrow definition of "traffic" in Article 3 of the agreement, the obligations of Article 8 are of a narrow and domestic character, that is to say, they put an obligation on the London and North Western Railway Co. to work it within the ambit of the undertaking which they are taking over so as to secure that natural development of traffic which is to be expected in the case of a well-managed undertaking. It seems to me that there is no obligation imposed on the London and North Western Railway Co. to work other parts of their undertaking so as to develop the traffic on this line. No doubt, in certain other cases which have been referred to, where there was an obligation to develop traffic generally, it was read in connection with all the circumstances of the case as involving some obligation to so deal with other parts of the undertaking of the working company as to give effect to that anticipated development, but I can find no obligation of that kind here, and I think that the existence of any such wider obligation is negatived rather than supported by the other parts of the agreement.

GLENAVON GARW COLLIERIES, LIM. v.
 RHONDDA AND SWANSEA BAY RAILWAY
 CO., GREAT WESTERN RAILWAY CO., AND
 BARRY RAILWAY CO.¹

Increase of Rate—Through Rates—Public Interest—Apportionment of Through Rate—Rebate—Railway and Canal Traffic Act, 1888, s. 25.

July 6, 7, 28. October 13, 14, 25, 1915. April 3, 4, 5, 14, 1916.
 —Coal was conveyed from two collieries over the lines of three railway companies at a charge equal to the rate by an alternative route. A through rate was ultimately fixed at a sum of 2d. per ton in excess of the original charge, in order to allow one of the companies to make a rebate of that amount in accordance with its practice with respect to other coal traffic. The consignors refusing to pay the new rate, the same was withdrawn.

Upon a complaint of an increase of rates, which was not defended, and upon an application for a through rate equal to the original charge—

Held, by the Railway Commissioners that in the circumstances it was in the public interest that a through rate of the same amount as the original charge should be allowed, and the fact that a rebate was allowed by one of the companies did not affect the reasonableness of the remuneration, there being nothing illegal in the rebate itself.

Held, further, that where a through rate is charged and traffic actually passes, a through rate is in existence, although not entered in the rate book.

The through rate subsequently was apportioned in such a way (after taking all circumstances into consideration) as to enable the above company to give a rebate of 2d. to the applicants.

Upon appeals by all the railway companies as to the granting of a through rate, and by two of the companies as to the apportionment—

Held, by the Court of Appeal affirming the decision of the Commissioners (Phillimore, L.J., doubting as to the apportionment), that (1) the question of rebate had been rightly excluded in fixing the amount of the through rate; and (2) the Commissioners had power to apportion the rate in such a way that part of it would be finally handed over to the trader.

(1) Before Lush, J., and Commissioners the Hon. A. E. Gathorne-Hardy and Sir James Woodhouse, sitting at the Royal Courts of Justice, London.

This was an application (a) complaining of an increase of rates and (b) for through rates for coal.

The applicants were the owners of two collieries known as the Glen Rhondda and Corrwg Rhondda Collieries which were connected by private sidings with the Rhondda and Swansea Bay railway, and from which coal was consigned to Barry Docks for shipment. Alternative routes were available for this traffic; the first route was over parts of the Rhondda and Swansea Bay, the Taff Vale, and the Barry Railway Cos. *via* Treherbert and Trehafod, the respective distances being approximately from Glen Rhondda twenty-eight and a-half miles and from Corrwg Rhondda thirty-one miles; the second, which started in a reverse direction, was over another part of the Rhondda and Swansea Bay railway to Cymmer and thence over parts of the Great Western and Barry Railway Cos., the traffic being handed to the Barry Co. either at Coity or Peterston. Over the second route the distances were somewhat longer.

Prior to 1908 all coal from the two collieries was consigned *via* the first of the above routes at a uniform through charge of 1s. 4 2-5d. per ton, being the total amount of the local rates over the three railways concerned. In 1908 the Great Western Co. approached the applicants with a view to having traffic consigned to Barry *via* the second route and a considerable amount of coal was so forwarded from both collieries and handed over to the Barry Co. either at Coity or Peterston. Invoices were rendered by the Rhondda Co. to the applicants showing a charge of 1s. 4 2-5d. per ton, being based on the rates *via* the alternative Taff Vale route, but these charges were not inserted in the appropriate rate books of the Rhondda Co.

A long correspondence took place between the Great Western Co. on behalf of itself and the Rhondda Co. on the one hand and the Barry Co. on the other with regard to the fixing of through rates for the traffic in question and their division, but owing to differences on the latter point no through rates were at that time agreed on or entered in the

appropriate rate books of the Rhondda Co., and no division was made of the amounts received from the applicants, such amounts being retained by the Railway Clearing House.

The Barry Co. in the course of certain previous Parliamentary proceedings had given an undertaking to a Parliamentary Committee not to charge more than $\frac{1}{2}$ d. per ton per mile for the conveyance of coal over its railway. The same company by an agreement with the Great Western Co. of March 25, 1890, forwarded over its railway from Peterston to Barry Docks—a distance of eight miles five chains—shipment coal coming from collieries on the Ely, Llynvi, and Ogmore Valley railways of the Great Western Co., and received as its share of the through rates on such traffic 6d. per ton, out of which the Barry Co. returned 2d. per ton to the consignors in order to comply with the above-mentioned Parliamentary undertaking. The present applicants, who were aware of the rebate so given by the Barry Co., claimed that they also were entitled to receive a similar rebate of 2d. per ton on all coal passing over the Great Western route *via* Coity or Peterston, and the Barry Co. at first had conceded their claim by deducting 2d. per ton from the dock dues payable by the applicants on this traffic at Barry Dock. The Great Western Co.—which represented itself and the Rhondda Co.—objected to any rebate being allowed the applicants on the ground that the sum of 1s. 4 2-5d. per ton charged on the applicants' shipment coal was a net charge based on the existing rates *via* the alternative Taff Vale route. Ultimately in December, 1913, it was agreed between the Great Western and Barry Cos. that through rates of 1s. 6 2-5d. per ton should be put into operation for the applicants' shipment coal traffic from both collieries to Barry Dock, out of which the Barry Co. should receive 10d. per ton *via* Coity and 6d. per ton *via* Peterston, and that the latter company should give a rebate of 2d. per ton to the applicants out of the proportions so received by it, thus making the net rates payable equal to 1s. 4 2-5d. per ton.

None of the three railway companies concerned published or gave notice of these rates as being increases of rates, but they were entered in the appropriate rate books of the Rhondda Co.

The applicants were informed by the Rhondda Co. as to the through rates which would be charged in the future on their coal traffic to Barry *via* the Great Western route, and thereupon objected to such rates as being increases of rates, and deducted the sum of 2d. per ton from the accounts rendered them by the Rhondda Co. Correspondence between that company and the applicants followed and finally, on December 4, 1914, the general manager of the Rhondda Co. gave the applicants notice that the above through rates were cancelled. The applicants thereupon complained to the Board of Trade of the alleged increase of rates, and the Board certified that the preliminary steps required by section 1, sub-section (3) of the Railway and Canal Traffic Act, 1894, had been duly taken.

The applicants by their application claimed—(1) an order declaring that the alleged increase of rates was illegal and unreasonable; (2) damages; and (3) in the alternative, through rates for the conveyance of their shipment coal from their two collieries to Barry *via* Peterston or Coity at 1s. 4 2-5d. per ton.

The Rhondda and the Great Western Railway Cos. by their respective answers contended that there was no increase of rates inasmuch as there was no previously established or published rate, and the object of fixing the rates at 1s. 6 2-5d. per ton was to enable a rebate of 2d. per ton to be given to the applicants and to establish net rates of 1s. 4 2-5d. per ton, being the same as the original charges and as the rates charged by the alternative Taff Vale route. With regard to through rates, they contended that those proposed were unduly low and not in the public interest. Alternatively, they did not object to through rates of 1s. 6 2-5d. subject to the repayment of 2d. per ton by the

Barry Co. or of 1s. 4 2-5d. free of such rebate, and they asked that in the event of through rates being allowed and fixed by the Court the same should be apportioned. The Rhondda Co. further alleged that the establishment of the rates proposed by the applicants less a rebate of 2d. per ton would prejudice it by unfairly undercutting its rates to Port Talbot and Swansea.

The Barry Co. by their answer denied that they were parties to the original charges of 1s. 4 2-5d., or to any alleged increases, and contended that the existing rates and route *via* the Taff Vale railway satisfied all the requirements of the public and the applicants, and the proposed through rates were not required in the public interest or at all. They further claimed that if through rates were allowed they should receive on the apportionment of the same no less a proportion than that which they received out of the rates in respect of coal traffic forwarded to Barry Docks *via* Peterston and Coity from the Llynvi and Ogmore Valleys, thereby enabling them to give a rebate of 2d. per ton.

On the application coming on for trial counsel for the Rhondda and Great Western Cos. stated that they did not propose to justify the increase of rates complained of since no notice of increase had been given, and the questions left for decision therefore were: (1) Whether through rates should be granted; if so, (2) their amounts; and (3) their apportionment between the three railway companies concerned. It was agreed between the applicants and the Rhondda and Great Western Cos. that for the purposes of this case only, so much of the route from the above two collieries to Cardiff, Penarth, and Barry *via* Cymmer (the junction of the Rhondda and Great Western lines) as was not the Barry railway should be treated as Great Western.

At the hearing the leading witness for the applicants admitted in cross-examination that the real question in discussion was the difference between a net rate of 1s. 4 2-5d. and a net rate of 1s. 2 2-5d.

J. H. Balfour Browne, K.C., and Harold Russell (for *H. O. C. Beasley*, serving with His Majesty's Forces), appeared for the applicants.

G. J. Talbot, K.C., Lynden Macassey, K.C., and H. A. McCardie, appeared for the Great Western Railway Co.

J. A. Hawke, K.C., and W. A. Robertson appeared for the Rhondda and Swansea Bay Railway Co.

Holman Gregory, K.C., and F. G. Thomas (for *H. Conacher*, serving with His Majesty's Forces), appeared for the Barry Railway Co.

LUSH, J.: The applicants are the owners of two collieries connected by sidings with the Rhondda and Swansea Bay railway, the coal from which was carried for many years to Barry for shipment, along the Taff Vale railway as far as Trehafod Junction, where it was handed over to the Barry Railway Co. The rate charged to Barry was 1s. 4 2-5d. This was not strictly a through rate, but was the sum of the two local rates to Trehafod and beyond.

The Great Western Railway Co. being desirous of obtaining some of the traffic, in 1908 offered to arrange for the conveyance of this coal to Barry by an alternative route, namely, by the Rhondda, the Great Western, and the Barry railways, either *via* Cymmer and Peterston, or *via* Cymmer and Coity Junctions, at the same rate, namely, 1s. 4 2-5d. This was agreed to, and for some four or five years the applicants' coal was so carried. This rate, although it was paid by the applicants without any deduction so far as the conveyance of the coal along the railways was concerned, involved a substantial advantage to the applicants because the Barry Co., who we were told had given some form of undertaking, when one of their bills was before Parliament, not to charge more than a certain rate per ton for the conveyance of coal carried to their docks, made a rebate to the applicants, as they did to other collieries in the vicinity of those of the applicants, of twopence a ton in respect of each

ton of coal so carried. This rebate was allowed in account off certain dock charges made by that company to the applicants. Some question was raised before us as to whether the fact that this rebate was made was known to the Great Western and the Rhondda and Swansea Bay Cos., who may be treated so far as this application is concerned as one and the same company. If it is material to decide it, I think that they did know of it. It was not disputed that they had heard "rumours" of it, and if they were not actually aware of what sums were paid and how they were paid, it was because they were content not to make enquiries. After a time, however, protests began to be raised with regard to the rebate, and to the applicants obtaining the benefit of it. Ultimately the Great Western Railway Co. took the view that, so long as the applicants took the benefit of it, they ought to pay twopence a ton more for the conveyance of their coal to Barry, so as to bring the net payment to 1s. 4 2-5d., and they accordingly gave notice that the rate was increased to 1s. 6 2-5d., and ultimately cancelled the old rate. The applicants refused to pay this increased rate, and thereupon the Great Western Railway Co. refused to carry their coal by this alternative route except at the increased rate.

The applicants applied to this Court in substance for a declaration that the Great Western Railway Co. were not entitled to so increase their rate, on the ground that the conditions precedent as to advertising had not been complied with, and for an enquiry as to damages. In the alternative, they asked for an order for a through rate at 1s. 4 2-5d. That the increase could not be justified was admitted before us, and the applicants, therefore, are entitled to the order which they asked as to the increase being illegal.

To make this order only, however, would still leave the question open whether the defendants were bound to carry at the old rate, and Mr. Balfour Browne, therefore, on behalf of the applicants, asked for an order for a through rate at the old rate of 1s. 4 2-5d. by the Great Western route. The

main contention on the part of the Great Western was as to the amount of the rate, that company claiming to have it fixed at 1s. 6 2-5d. The main contention by the Barry Co. was that the applicants were not entitled to a through rate at all, that company asserting that no public interest in favour of it had been established. These are the two questions that we have to decide.

A question was raised by Mr. Hawke, on behalf of the Rhondda Co., as to the through rate proposed by the applicants being prejudicial to the interests of the collieries nearer to Swansea, but, in my opinion, there was no real foundation for that contention, and no sufficient evidence was given to justify it.

It is necessary to mention an argument that was raised before us in connection with the existence of the 1s. 4 2-5d. rate during the four or five years during which the coal was carried by the Great Western route, which was this. It appears that that rate had never been inserted in the rate book. It was said that, because this was so, there had been no through rate in existence. It is impossible, in my opinion, to rely on such a contention. The railway company cannot take advantage of their own wrong in not inserting it in the rate book. If the rate was offered, as it was, and has been charged, as it has been, for several years, and the coal has been carried at that rate, the position cannot be altered because of the company's omission to do what the statute required.

Now, I think that, as Mr. Balfour Browne contended, the fact that this rate was charged, and the fact that it would be charged by the Great Western Co. now, and would be considered a reasonable rate to charge, as it was admitted it would be if the Barry Co. were to cease to allow the rebate, affords sufficiently strong evidence that it is the proper amount at which to fix the through rate. It clearly is, in my opinion, a reasonable rate for the carriage of the coal by the route in question. The fact that the Barry Co. allow a rebate

to all the collieries sending coal by this route does not affect the reasonableness of the remuneration for the carriage of the coal. There is nothing illegal in the rebate itself, whatever disadvantages may arise and whatever difficulties may be created by such a practice, and the propriety of the rate for the conveyance of the coal cannot, in my opinion, be altered by the fact that the rebate is made, at all events under the circumstances of the present case. I, therefore, think that the through rate should be fixed at 1s. 4 2-5d.

With regard to the contention that no public interest has been shown, I think that it clearly has. It is obviously to the public interest to have an alternative route for the carriage of coal in such circumstances as these, and the route in question is a natural alternative route by which the coal has in fact been carried for many years and it is in the public interest that a through rate should be charged.

In my opinion, therefore, the applicants are entitled to the order which they ask for the through rate, at the amount proposed by the applicants. The question of apportionment stood over, and will be dealt with at the next sitting of the Court.

HON. A. E. GATHORNE-HARDY: The facts in this case are set out in the application, and are really not in dispute. Prior to 1908 coal traffic for shipment from the applicants' collieries to Barry was consigned *via* the Taff Vale railway, and handed to the Barry railway at Trehaft Junction, at a rate, not strictly a through rate, but the sum of two local rates amounting in all to 1s. 4.4d. In the early part of 1908 the Great Western Co., who are to be treated as comprising also the Rhondda Co. for the purpose of this case, approached the applicants, and invited them to consign coal traffic to Barry Dock by their alternative route *via* Cymmer and Peterston Junction, or *via* Cymmer and Coity Junction. The rate they offered, which was accepted by the applicants, was also 1s. 4.4d., and under this rate the applicants' coal has been

conveyed for a period of over five years, and upwards of 50,000 tons has been conveyed to Barry Dock in competition with the Taff Vale route, which has, however, still conveyed by far the larger portion of the applicants' coal traffic.

In January 1914 the Great Western Co. gave notice of an increase of this rate for shipment coal to 1s. 6.4d., an increase of 2d. The applicants objected and refused to pay the increased rate, and in the month of December the defendants purported to cancel the rate, and refused to carry the applicants' traffic by the Peterston and Coity Junction routes. The applicants under these circumstances claim (a) that the increased rates are illegal, and that the defendants be enjoined to desist from charging the same; (b) an order for enquiry as to damages; (c) in the alternative an order for a through rate at the old amount of 1s. 4.4d.

The defendants failed to justify the increased rate, and offered no evidence or argument in support of the increase. Under these circumstances the applicants are clearly entitled to the first two orders asked for; and I am by no means clear that any further decision is required to entitle them to have their traffic carried by the old rate as a reasonable facility. Mr. Balfour Browne, however, out of caution, and with a view to avoiding any possible necessity for a further application to the Court, asked for a through rate at the old amount. The old rate was never published in the rate book, but I do not think anything turns on this, as it was admittedly charged for five years and more, and the defendants certainly cannot gain any advantage from having neglected to perform their statutory duty. Mr. Browne, however, admitted that on the application of a through rate it was open to us to fix the amount, but he contended that the fact that the rate was originally proposed by the defendants and charged by them for five years was such strong evidence of the proper amount, in the absence of any qualifying evidence of it being unduly low or unremunerative, as to be practically conclusive. With this contention I agree.

We heard a great deal of evidence and argument about a rebate of 2d. per ton which is returned by the Barry Co. to all traders out of their proportion of the rate on coal traffic going to Barry Dock *via* Peterston and Coity Junction. I am of opinion that we have nothing to do with this rebate, which has been well known in the district ever since the Barry railway came into existence; and must have been also well known to the Great Western Co. at the time they fixed the rate and commenced competing for the traffic. The goods manager, responsible at the time, is dead, but I have no hesitation in drawing the inference of knowledge from the whole of the evidence.

I have repeatedly expressed my dislike to rebates which do not appear in the rate books, as I think that it is important to traders and the public that rate books should give full and complete information to any one searching them. I am, however, of opinion that this particular rebate, which was the result of a Parliamentary bargain, was not open to much objection. At any rate it has no bearing upon our duty of fixing the amount of the through rate. It was argued that there was no sufficient public interest to enable the applicants to ask for a through rate. An alternative route in case of labour disputes or congestion is clearly one public advantage, and in this case it is proposed to close a route, and put an end to a competition which has existed for five years. I am clearly of opinion that there is sufficient public interest, and that we should fix the through rate asked for of 1s. 4.4d.

SIR JAMES WOODHOUSE: The applicants are colliery proprietors in South Wales. They own the Glen Rhondda Colliery situate at the Taff Vale or eastern end of the Rhondda and Swansea Bay tunnel, and also the Corrwg Rhondda Colliery situate at the Cymmer or western end of the same tunnel. These collieries connect only with the Rhondda and Swansea Bay railway. From these collieries coal is sent to Barry Docks for shipment. For this purpose there are alter-

native routes—viz., the Taff Vale route and the Great Western route. By the Taff Vale route, which is the shorter route, the traffic passes from the colliery *via* the Rhondda railway on to the Taff Vale at Treherbert, and thence on to the Barry Co.'s line at Trehafod Junction. The aggregate rate by this route to the Barry Docks is 1s. 4.4d. By the Great Western route the traffic passes on to the Great Western railway at Cymmer Junction, and is then handed over to the Barry Co. either at Peterston Junction or at Coity Junction near Bridgend, which is the junction connecting the Vale of Glamorgan railway (worked by the Barry Co.) with the Great Western railway..

Prior to the year 1908 the applicants sent their coal entirely by the Taff Vale route, which is the shorter and natural route. They were solicited by the Great Western Co. about this time to send some of their traffic by their route, and it is said that as an inducement to the applicants to do so the Great Western Co. promised to charge them the same conveyance rate as was in force by the Taff Vale route *via* Trehafod Junction. The applicants accordingly consigned traffic from the before-mentioned collieries by the Great Western route, and the charge made by them for conveyance was invoiced at 1s. 4.4d. From this charge the applicants claimed from the Barry Co. a rebate of 2d. per ton, which they deducted from their accounts. This for some time was allowed to pass unchallenged, as the Barry Co. from the opening of their line (pursuant, it is said, to an undertaking given in Parliament that they would not charge a higher conveyance rate than $\frac{1}{2}$ d. per ton per mile) have allowed a rebate of 2d. per ton on all coal from the west, whether received at Peterston Junction or Coity Junction. Owing to this rebate allowance a dispute arose between the Great Western Co. and the Barry Co. as to the division of the rate by the Coity Junction route, and it seems hardly credible that this controversy should have been carried on by interviews and by a voluminous correspondence between high officials, extending over six years,

without having been brought to a definite issue. As between the contending companies the ultimate solution arrived at was to charge the applicants as from January 1, 1914, a rate *via* the Great Western route of 1s. 6.4d. per ton, the Barry Co. undertaking to allow them out of such rate a rebate of 2d. per ton.

This was communicated to the applicants, who at once objected that this amounted to an increase of the rate by 2d. per ton over what they had hitherto been charged. The defendants insisted on the higher charge, and refused to carry the traffic unless it were paid. The applicants have filed a complaint in this Court and ask for an order that the increase from 1s. 4.4d. to 1s. 6.4d. is illegal and unreasonable. The defendants admit that the higher charge which they published in their rate book cannot be justified before us as a legal through rate, and the applicants are therefore entitled to the order which they ask for on this head of their claim.

The applicants also claim that, as the defendants have now refused to carry their traffic by the Great Western route, an order should be made against the defendants giving them this facility and allowing a through rate. On this head two questions arise: Is the route a reasonable route, and is the rate of 1s. 4.4d. per ton which is proposed by the applicants a reasonable rate? The route has been used for several years, and that it is a reasonable route has not been previously questioned, nor, in view of the fact that the rate proposed is the same rate as that by the shorter route and as that which the Great Western Co. promised the applicants to carry their traffic, can it be an unreasonable rate. It is said as against the applicants that it is not a reasonable facility because there is no question of public interest involved, inasmuch as the applicants only will benefit by getting the rebate of 2d. per ton. I do not agree with this view. An alternative route is *prima facie* a public advantage, and the defendants have not discharged the onus upon them to show that it is not so in this case. It was well known to the Great Western Co..

when in 1908 they invited the applicants to send the coal by their route at the same rate as the Taff Vale route that this rebate of 2d. per ton was in operation over the Barry line. Mr. Rendell, who was at that time in the service of the Great Western but is now manager of the Barry Co., makes that perfectly clear in his letter to the Great Western goods manager of March 23, 1914, when he writes: "I think it is clear that when the competition with the Taff Vale route was decided upon you were fully cognisant of all the facts governing the Barry Company's position." This is not dissented from by the Great Western manager, but the real truth is that, in their eagerness to get the traffic, the Great Western Co. carried it at the promised rate before they had ever arrived at any complete understanding with the Barry Co. as to the division of the rate which is the real cause of all the difficulty which has arisen. The dispute between the defendant companies as to the effect of the Barry Co.'s rebate, which circumstances might terminate on the apportionment, ought not to affect the right of the applicants to have that through rate fixed quite apart from the consideration of such rebate. We are now asked to make a compulsory order fixing as a through rate that which the applicants enjoyed under the voluntary arrangement, and I think in the special circumstances of the case that they are in fairness and reason entitled to such order for a through rate of 1s. 4.4d. The apportionment, I understand, is to be the subject of a special application.

The Court subsequently proceeded to deal with the apportionment of the rate of 1s. 4 2-5d. per ton.

The Great Western Co. proposed that on traffic conveyed *via* Peterston the Great Western Co.'s share (including the part due to the Rhondda Co.) should be 1s. 2-5d., and the Barry Co.'s share 4d.; and on traffic conveyed *via* Coity the Great Western (including the Rhondda) share should be 8 2-5d. and the Barry share 8d., on the ground that the

Barry Co. had agreed in previous correspondence to accept these figures. It was further contended on behalf of the Great Western Co. that the previous decision of the Court had been given independently of any rebate, and that as the Parliamentary undertaking of the Barry Co. only came into force when a coal rate over its railway exceeded $\frac{1}{2}$ d. per mile, the effect of the proposed apportionment—which did not give the Barry Co. a higher mileage rate than $\frac{1}{2}$ d. per ton—would be to make effective the rate of 1s. 4 2-5d. fixed by the Court.

The Barry Co. proposed that their share should be 6d. *via* Peterston, and 10 $\frac{1}{2}$ d. *via* Coity. They supported their claim for 6d. per ton *via* Peterston on the ground that (1) the correspondence supported it, (2) it was the agreed sum received by it out of other through rates on coal traffic handed over at Peterston by the Great Western Co., and (3) they had provided sidings at Peterston and Barry. With regard to the rate *via* Coity they claimed 10 $\frac{1}{2}$ d. per ton, which was slightly higher than the mileage rate on the ground that they provided sidings at Coity. An apportionment of the rate of 1s. 4 4-5d. based on mileage, would have given the following results after crediting the Rhondda and Great Western Cos. in the case of the Glen Rhondda traffic with certain extra mileage chargeable for traffic passing through the Rhondda tunnel under the Rhondda Co.'s Rates and Charges Order, 1892:—

		Rhondda and	
		Great Western.	Barry.
From Glen Rhondda			
<i>via</i> Peterston	...	1s. 0·9d.	3·5d.
<i>via</i> Coity	...	7·3d.	9·1d.
From Corrwg Rhondda			
<i>via</i> Peterston	...	1s. 0·4d.	4d.
<i>via</i> Coity	...	6d.	10·4d.

The same counsel appeared for the several railway companies as at the first hearing.

LUSH, J.: In this case the Court has to apportion the through rate of 1s. 4 2-5d. which was fixed by the Court some few weeks ago when the case first came before us. I ought

to say, perhaps, that, although there were three railway companies concerned in this through rate, it has been agreed for the purposes of this case that the Rhondda and Swansea Bay Railway Co. should be treated as one and the same with the Great Western Co., and, therefore, we only consider the matter as between two companies, the Great Western Railway Co., on the one hand, and the Barry Co. on the other. I desire also to say this, before stating the conclusion at which the Court has arrived, that we have not come to the conclusion to which he have come, entirely and exclusively upon the correspondence. The letters ranged over a very large number of years, and, although, of course, the correspondence is one of the elements to be considered, we do not base our judgment entirely upon it, but, looking at all the circumstances, as we have very carefully looked at them, and, considering the case in its various aspects, we have come to the conclusion that the proper sum to apportion to the Barry Co. is, in respect of the Peterston route, the sum of 6d., and, in respect of the Coity route, the sum of 10d., the balance to go to the Great Western Railway Co., representing for this purpose the two companies, the Rhondda and Swansea Bay Railway Co. and themselves.

The Rhondda and Swansea Bay and Great Western Cos. appealed against the order allowing through rates and also against the apportionment. The Barry Co. appealed on the first point only.

G. J. Talbot, K.C., and H. A. McCardie, for the Great Western Railway Co. :—

The Railway Commissioners excluded consideration of the rebate in fixing the total rate, but have apportioned that rate in such a way that the rebate can be given by the Barry Co. The trader, therefore, will pay 2d. less than the amount fixed as being a fair rate. The Commissioners, in effect, have apportioned the rate between the several railway companies and the applicants; they had no jurisdiction to do this or to give the Barry Co. a larger proportion than they will keep.

W. A. Robertson appeared for the Rhondda and Swansea Bay Railway Co.

H. Holman Gregory, K.C., and *F. G. Thomas* (for *H. Conacher*, serving with His Majesty's Forces), for the Barry Railway Co.:—

With regard to the through rate, there is no evidence that it is in the public interest. It is from the trader's sidings and it is a personal advantage only. This is not sufficient—see *Brunner, Mond & Co. v. Cheshire Lines Committee*.¹ With regard to the apportionment, it is a decision of fact from which there is no appeal and it has not been shown that the Commissioners misdirected themselves on any point of law.

Leslie Scott, K.C., and *Harold Russell*, for the applicants, were not called upon.

LORD COZENS-HARDY, M.R.—These appeals raise two questions, and only two questions. The first is whether a through rate should be granted from two collieries on the north of the Rhondda and Swansea railway to Barry *via* the Great Western railway and the Barry railway. And the second is how the through rate should be apportioned between the Great Western railway and the Barry railway. For the purpose of the present appeals these two railway companies need alone to be considered, the Rhondda and Swansea being worked by the Great Western company. For several years the traffic from the collieries to Barry was conveyed *via* the Taff Vale route to Trehaftod Junction, where it was handed over to the Barry Co. The rate charged was 1s. 4 2-5d., not strictly a through rate, but the sum of two or three local rates. A great deal of coal is still carried by that route and at that rate.

The Great Western Railway Co. in 1908 desired to obtain some of this coal traffic by conveying it either to Peterston

(1) *Ante*, Vol. XIV. 124.

Junction or to Coity Junction, and thence by the Barry line to Barry. The rate charged was the same as on the Trehafod route, namely, 1s. 4 2-5d., although the distance was greater. This was continued for some four or five years. The Great Western Co. then cancelled the rate of 1s. 4 2-5d., and increased it to 1s. 6 2-5d., and refused to carry coal for less. This increase was, as is admitted, illegal. The Colliery Co. applied to the Commissioners for a through rate to Barry. In my opinion, the jurisdiction to grant a through rate is clear. The advantages of an alternative route are obvious, and the disadvantages of stopping the *de facto* alternative route, which was used for several years, are manifest. The question is one of public interest. This was the view of the Commissioners. They granted a through rate of 1s. 4 2-5d. They held that this is a reasonable rate. It seems to me that this is a question of fact, which it is not competent for this Court to deal with. But I see no reason to doubt that the decision of the Commissioners was perfectly correct. It is the rate charged by the Trehafod route—it is the rate charged for four or five years by this very route. This disposes of the first question.

There remains the question of apportionment of the through rate between the Great Western and the Barry Companies. That is a matter which does not directly concern the Colliery Co. The Great Western Co. contend that as the Barry Co. are allowing a rebate of 2d. to all traders on coal going to Barry Dock *via* Peterston or Coity, this rebate ought in some way to be brought into account, and that either the rate should be treated as 1s. 6 2-5d. gross and 1s. 4 2-5d. net, or the Barry should undertake not to give any rebate in future. The position of the Barry Co., so far as I understand it, is this. They are not under any legal liability to allow this rebate, but an undertaking was given, I presume by counsel, in the committee room, when a Barry Company's Bill was before a Parliamentary Committee, that they would not charge more than $\frac{1}{2}$ d. per ton per mile. Now they get 6d.

for a distance of eight miles in respect of the coal conveyed over their line *via* Peterston, which is 2d. more than the undertaking allowed. The Commissioners declined to recognise this undertaking. If the Barry Co. choose out of their own proportion to make a present to traders, that cannot confer any right upon the Great Western Co.

In apportioning the 1s. 4 2-5d. the Commissioners have allowed to the Barry Co. 6d. in respect of the Peterston route and 10d. in respect of the Coity route. I do not think that we ought to interfere with this. The mileage basis is often adopted, but not necessarily. If I were satisfied that the Commissioners had proceeded upon a wrong basis, of course we could interfere, but not otherwise. For example, if they held that the voluminous correspondence extending over several years established a bargain between the two companies, and they acted upon that view, the apportionment could not stand. But I am satisfied there was no concluded agreement. Mr. Justice Lush clearly repudiates any such suggestion. He says the conclusion arrived at is not based entirely and exclusively upon the correspondence. "The correspondence is one of the elements to be considered. We do not base our judgment entirely upon it, but looking at all the circumstances, as we have very carefully looked at them, and considering the case in its various aspects, we have come to the conclusion that the proper sum to apportion is" 6d. and 10d. to the Barry. The proper apportionment is *prima facie* a finding of fact, with which we cannot interfere. I can find no misdirection in point of law which would justify our interference. In my opinion the appeal of the Great Western Railway Co. fails.

PHILLIMORE, L.J.: We have to deal with five appeals, three by the Rhondda and Swansea Bay Railway Co., the Great Western Railway Co., and the Barry Railway Co., severally from a decision of the Commissioners granting a through route and through rate to the Colliery Co., and two by the Rhondda

and Swansea Bay Co. and the Great Western Co. against an apportionment of the through rate which these appellant companies say is too favourable to the Barry Co.

The circumstances which have led to this litigation are briefly as follows: The Barry railway was opened for traffic in 1889, and from the first the railway rates for coal from the colliery companies sending their coal to Barry were fixed as being the same as those charged for conveyance to Cardiff. These two collieries, which are situate on the Rhondda and Swansea Bay railway, were at first in the habit of sending their coal to the Barry Docks by what may be called the easternmost route, namely, by the Rhondda and Swansea Bay railway and the Taff Vale railway, getting on to the line of the Barry railway at Trehafod.

The rate for the carriage of the coal to Barry was fixed at 1s. 4 2-5d. (16.40d.), being the same rate as to Cardiff; and this route with this rate was used for many years; the rate being the sum of the three following rates: 2.6d. to the Rhondda and Swansea Bay railway, 5.32d. to the Taff Vale, and 8.48 to the Barry. In 1908 the Great Western Railway Co., which was then, and still is, working the Rhondda and Swansea Bay line, approached the collieries with a view to getting them to send coal by a more westerly route, namely, by the Rhondda and Swansea Bay railway and the Great Western railway, joining the Barry line at Peterston, or, alternatively, joining the Vale of Glamorgan railway, which was being worked by the Barry Co., at Coity. And the collieries agreed so to do. The result was to eliminate the Taff Vale railway, and also to give the Barry railway a smaller distance to carry and a smaller proportion of the rate. And it became necessary to settle this proportion.

Now, when the Barry railway was opened, it was connected with the Great Western railway at Peterston, so as to carry coal from certain collieries on the Great Western railway system, called the Ely Valley, Llynvi, and Ogmore collieries, to Barry, and it became necessary to ascertain the rates and

the proportions. The rates were, as in other cases, made the same as those to Cardiff, and varied for each colliery. But by an agreement made between the two railway companies on March 25, 1890, the Barry Co. was to have a constant sum of 6d. per ton, the Great Western railway taking the rest. Now, from Peterston to Barry Docks is only a matter of eight miles, and when the Barry undertaking was promoted in Parliament the Barry Co. gave a pledge to the Committee that they would not take more than a halfpenny per ton per mile for coal. Consequently out of this sixpence they had to make a rebate of 2d. to the Llynvi and Ogmore system of collieries. If the apportionment for the coal from the applicants' collieries when going *via* Peterston was to be the same, the Barry Co. would have to return 2d., and the total rate of nominally 1s. 4d. and a fraction would, by reason of the rebate, be reduced to 1s. 2d. and a fraction.

At first the Great Western railway proposed, it is said *per incuriam*, to allow the Barry Co. the 6d.; and an agreement would have been made to this effect if the two companies had not had a difference of opinion with respect to the proportion to be paid on the alternative and less used route *via* Coity. As it was, no agreement was arrived at, but the Barry Co. did at first assume that they would get 6d., and did return 2d. to the traders. Afterwards, when the Great Western Co. insisted that the Barry Co. should only have 4d. and that there was no need that Barry should make any rebate, the Barry Co. informed their customers that the rebate had been made inadvertently, and they were not going to allow it in future. The traders, however, insisted on their right to deduct the 2d., though the Barry Co. told them that the insistence was unwarranted, and the matter remained unsettled both between the Great Western and the Barry Companies, and, as I gather, between the Barry Co. and the traders.

After this had gone on for five years, a suggestion was made by the Great Western Co., and accepted by the Barry Co.,

that the Great Western Co. should announce a total rate of 1s. 6d. and a fraction, out of which the Barry Co. should have 6d. in the case of Peterston and 10d. in the case of Coity, and would return in either case 2d. to the traders, so as to make the real rate the same as before, namely, 1s. 4d. and a fraction. This was accordingly done; and thereupon the applicant collieries took these proceedings, claiming that this was an increase of rate, and putting upon the railway companies the burden of justifying it under section 1 of the Railway and Canal Traffic Act of 1894, and, in addition, asking the Court under section 25 of the Railway and Canal Traffic Act of 1888 to declare that the westernmost route was a reasonable route and to fix a through rate for this route. The three railway companies had to admit that they could not justify the increased rate of 1s. 6d. and a fraction, and that so far an order must be made against them. But they insisted that there was not sufficient ground for the Commissioners to impose a through rate by the westernmost route. The Commissioners thought otherwise, and fixed the through rate at 1s. 4d. and a fraction, and the first three appeals are by the railway companies against this order.

After hearing the appellants' counsel we came to the conclusion, and so intimated to the respondents' counsel, that these appeals failed. There is no appeal from the Commissioners to the Court of Appeal, except on questions of law. If there had been no evidence upon which the Commissioners could have decided that the westernmost route was a reasonable route, or the rate a reasonable rate, an appeal would have lain. But it seems to me that the Commissioners had materials enough. Coal had passed by the westernmost route, either *via* Peterston or *via* Coity, from these collieries to the Barry Docks for upwards of five years. It was in the interest of the public that, with so important an industry and so large a shipping port, there should be alternative modes of getting from the collieries to the port. And if the route was a reasonable route and it was right for the Commissioners—as it would

be—to fix a through rate, that rate which had prevailed for five years, and which the railway companies admitted they were willing to take, was one of which they could not reasonably complain. The only argument urged against it was that if it were apportioned in a particular way it would result in a rate of 1s. 2d. and a fraction. But the Commissioners, I think rightly for this purpose, declined to consider the question of rebate; rightly, I think, because till the subsequent question of apportionment came to be decided there was no certainty that there would be a rebate or that the rate would work out at 1s. 2d. and a fraction. Taking the case in stages as it was taken, the indirect effect of a possible but not certain apportionment could not be considered. And if it was not to be considered, the railway companies had no case.

At a subsequent hearing the Commissioners embarked on the question of apportionment, and they ultimately decided, after having (as they said) taken into consideration all the circumstances, including the correspondence for many years between the Great Western Co. and the Barry Co., that the apportionment to the Barry should be 6d. when *via* Peterston and 10d. when *via* Coity. From this decision the Rhondda and Swansea Bay Co. and the Great Western Railway Co. have appealed to us. Again, unless there be some point of law, the decision of the Commissioners is final. What is urged for the appellants is that into this matter the question of rebate must enter; that the Commissioners knew when they made this apportionment that the Barry must, and would, return 2d. out of it to the traders; and that by so apportioning they were stultifying their own previous decision, as they were establishing a rate of only 1s. 2d. (I need not repeat the fractional addition) instead of 1s. 4d. Or, to put it in another way, that they were apportioning the 1s. 4d., not between the two railway companies, but between the two railway companies and the traders, which they had no jurisdiction to do.

No doubt the Commissioners have said that they took all circumstances into consideration, but I cannot trace any further circumstances which would warrant their particular apportionment than the following: (1) that the two companies in their correspondence nearly came to terms as to the more important item of the 6d., which, if once admitted, almost certainly carries the 10d. by reason of the obligations of Barry to the Vale of Glamorgan railway; or (2) that it was desirable that Barry should have the 2d. extra in order that it might make the same rebate to the applicant colliery company that it had to make to the Llynvi and Ogmore system. I doubt whether these are reasons enough if they are all. If the rate is here apportioned, as is usual, upon mileage, the Barry share would be fractionally under 4d. *via* Peterston. In the correspondence Barry never asked for more than 4d. net *via* Peterston. As to Coity, the mileage apportionment would give Barry about 9 $\frac{3}{4}$ d.—not far off the 10d., but still short of the 10d., and in excess of the 8d. net with which Barry intimated that it would be content.

Something was said on both sides about terminals, but, as far as the evidence was read to us, there seems no reason to suppose that the introduction of terminals into consideration would benefit the Barry Co. rather than the Great Western Railway Co., with which for this purpose the Rhondda and Swansea Bay Co. stands or falls. Counsel for the appellants said that the rebate had to be taken into consideration, but for the purpose of destroying rather than supporting the 6d. and 10d. apportionment. He contended that the Commissioners could not give an apportioned share to Barry which they knew Barry could not keep. If this were sound, we ought to rectify the apportionment by ourselves making it 4d. and 8d. I could not see my way to this; but I have hesitated very much as to whether the case ought not to be remitted to the Commissioners with some direction to exclude irrelevant matters; but upon the whole I will not press this hesitation against the opinions of the other members of the Court.

SARGANT, J.: Two orders of the Railway and Canal Commission are under appeal here, the first an order dated July 28, 1915, by which the applicants, the Glenavon Garw Collieries, Lim., were granted through rates of 16.4d. for coal for shipment from their Glen Rhondda and Corrwg Rhondda collieries to Barry Docks *via* Cymmer and Peterston or Coity; and the second an order dated October 25, 1915, whereby these through rates were apportioned on the principle that there should be allowed to the Barry Railway Co. out of the said through rates 6d. per ton for coal *via* Peterston, and 10d. per ton for coal *via* Coity, and to the Great Western Railway Co. and the Rhondda and Swansea Bay Railway Co. the balance of the said through rates. All the three railway companies are appealing against the earlier order, which is, of course, supported by the applicants, the Glenavon Garw Collieries Co. The Great Western Railway Co. and the Rhondda and Swansea Bay Railway Co. are appealing against the second order, and the respondents to that appeal are the Barry Railway Co.

The collieries in question lie on, and are connected with, a railway of the Rhondda and Swansea Bay Railway Co., which is worked by the Great Western Railway Co. The interests of these two railway companies are identical on both appeals, and the matter may be treated for convenience as if that railway were a part of the undertaking of the Great Western Railway Co., and they were the sole appellants on the second appeal, and the only co-appellants of the Barry Railway Co. on the first appeal. The through rates in question had in fact been in operation both *via* Peterston and *via* Coity for some five years (though they had not actually been shown in any rate book), but had recently been increased by the Great Western Railway Co. to a rate of 18.4d. to allow for the rebate of 2d. hereinafter mentioned. The 16.4d. rate is the same as the sum of the rates by an older and alternative route lying more to the east, namely, a route by Trehaftod Junction, over one of the railways of the Taff Vale Railway

Co. and then over another railway of the Barry Railway Co. That the rate in question is in itself, and apart from the circumstances as to the 2d. rebate, a perfectly fair and adequate through rate has not been, and indeed could not be, questioned in this Court.

On the appeal from the order of July 28, 1915, there are two possible questions of law arising for the determination of this Court. The first is whether there was any evidence on which the Railway and Canal Commission could come to the conclusion that it is in the public interest that a through rate should be granted. As to this, the finding of Mr. Justice Lush was as follows: "With regard to the contention that no public interest has been shown, I think that it clearly has. It is obviously to the public interest to have an alternative route for the carriage of coal in such circumstances as these, and the route in question is a natural alternative route by which the coal has in fact been carried for many years, and it is in the public interest that a through rate should be charged." And the findings of Mr. Gathorne-Hardy and Sir James Woodhouse were to a similar effect. In the circumstances thus stated, it seems to me obvious that the tribunal had ample material on which they might find that it was to the public interest to create, or at least to preserve, the facilities in question for the conveyance of so prime a necessity of life and industry as coal. And there were in fact additional circumstances pointing in the same direction, such as the fact that there were somewhat greater facilities for the handling and distribution of the respondents' traffic *via* Cymmer than *via* Trehafod.

The second possible question of law on the appeal from the order of July 28, 1915, is whether, when the Court had come to the conclusion that 16.4d. was a proper through rate, they could properly fix it at that sum, having regard to the fact that the Barry Co. were making a rebate of 2d. per ton on coal going by either of the routes in question, and would certainly allow such a rebate on the coal now in question,

unless an apportionment of the 16.4d. were made which would allow them 2d. per ton less than they had in fact been receiving out of the existing 16.4d. rate. It was acknowledged that there was no legal obligation binding the Barry Co. to make such a rebate, and that it would be made as regards the Peterston route by virtue of the public Parliamentary undertaking given many years ago when that part of their system was the subject of a Parliamentary conflict, and as regards the Coity route, partly by virtue of that undertaking and partly because of other circumstances into which it is unnecessary to go. But it was said that the Court must look, not at the nominal rate of 16.4d., but at what was called the real rate, namely, the nominal rate after the deduction of the 2d. rebate; and that if the real rate ought to be 16.4d., the nominal rate should be 18.4d., which is what the Great Western Railway Co. had recently been charging. In view, however, of the facts, first, that the giving of the rebate was in law a voluntary concession on the part of the Barry Railway Co. not in any way affecting—except possibly as regards subsequent apportionment—the position of the Great Western Railway Co., and, secondly, that no legal objection could be pointed out, so far as the Great Western Railway Co. were concerned, to the allowance of the rebate, it seems to me that the Commissioners were quite right in disregarding the rebate as they did; and I desire to adopt on this point the following passage in the judgment of Mr. Justice Lush: “There is nothing illegal in the rebate itself, whatever disadvantages may arise and whatever difficulties may be created by such a practice, and the propriety of the rate for the conveyance of the coal cannot in my opinion be altered by the fact that the rebate is made, at all events under the circumstances of the present case.”

The appeal from the order of October 25, 1915, has now to be considered, as to the apportionment of the through rate which had been fixed by the earlier order. Apportionment *prima facie* merely rests on fact, and it is significant that

counsel for the appellants were unable to refer to a single instance in which there had been an appeal to this Court from such an order. But it was said here, too, that there were two questions of law involved in the order, which rendered it appealable. In the first place, it was urged that the Court below had no right to make an order, the result of which would in fact be that a part of the rate under apportionment would be handed over to neither of the two railway companies but to the trader. And in support of this argument, which was very much the same as the second argument on the appeals from the first order, the provisions of section 25 of the Railway and Canal Traffic Act, 1888, were referred to. But, after a very careful examination of the precise terms of that section, I can find nothing which, after apportionment, prevents a railway or canal company being as free to deal with its apportioned part of a through rate as it is with regard to any other rate belonging to it. Apart from questions of undue preference and the like, which do not arise now between the Great Western Railway Co. and the Barry Railway Co., I can see nothing to prevent the Barry Railway Co. from charging less than their authorised rates to any traders or group of traders; and it follows, therefore, that there is nothing to prevent them as against the Great Western Railway Co. from in fact lowering their proportion of this particular rate by means of returning a rebate of 2d. per ton.

The second argument is that it appears, or at least this Court must infer from all the circumstances, and particularly from the disproportion between the 6d. apportioned to the Barry Railway Co. in respect of the Peterston route and the 4d. or less they would receive on a mileage proportion, that the existence of this rebate of 2d. per ton was the reason why the Court below made the apportionment it did. And it is said that if this is so the Court was not apportioning a rate of 16.4d., but was reserving a sum of 2d. out of that rate and then apportioning the remainder of the rate, namely,

14.4d. If this were in fact so, the apportionment would no doubt be bad. But I cannot find that it is so. In making their earlier order the members of the Court clearly showed that they were altogether disregarding the rebate of 2d. per ton, and dealing simply and solely with a through rate of 16.4d. per ton. And it is impossible to suppose that, when proceeding shortly afterwards to apportion that very through rate, they departed from this attitude and dealt with it as a rate of 14.4d. only. There is no doubt a considerable disproportion in the case of the Peterston route between the amount apportioned to the Barry Railway Co., and their proportion if based on mileage only. But it is clear that there are other circumstances than mileage which the Commissioners may in general take into consideration, and that many such circumstances existed here. And in the long negotiations which took place between the two railway companies, and which might, in my judgment, fairly be taken into account, amongst other things as affording some indication of what would be a fair and reasonable apportionment, it is quite clear that for a very long period at any rate there was no objection at all on the part of the Great Western Railway Co. to an apportionment of 6d. per ton to the Barry Railway Co. on coal *via* Cymmer and Peterston, except from the point of view of the ultimate destination of a portion of that apportioned part.

I am therefore of opinion that the Commissioners have not in any way misdirected themselves on any point of law, and that the appeals from both orders should be dismissed.

Solicitors—Williamson, Hill & Co., agents for Ingledeew & Sons, Cardiff, for the applicants; Tamplin, Taylor & Co., agents for Hugh Bellingham, Swansea, for the Rhondda and Swansea Bay Railway Co.; L. B. Page, for the Great Western Railway Co.; Downing, Handcock, Middleton & Lewis, agents for Downing & Handcock, Cardiff, for the Barry Railway Co.

THE ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900) LIM., THE RHEE VALLEY PORTLAND CEMENT WORKS, AND THE CAM BLUE LIAS LIME AND CEMENT CO., LIM. v. GREAT NORTHERN RAILWAY CO.¹

Increase of Rates—Rise in Cost of Working as result of Improved Labour Conditions—Method of Proof—Railway and Canal Traffic Act, 1894, s. 1—Railway and Canal Traffic Act, 1913, s. 1.

November 29, 30. December 1, 2, 1915. February 21. April 5, 6, 7, 14, 1916.—Upon a complaint of an increase of 4 per cent. in certain exceptional rates (being part of a general increase of that amount in all exceptional rates) the defendant railway company having made certain improvements in the employment conditions of their staff since August 19, 1911, pleaded that the increase complained of was justified under section 1 of the Railway and Canal Traffic Act, 1913,² and in proof thereof showed

(1) Before Lush, J., and Commissioners the Hon. A. E. Gathorne-Hardy and Sir James Woodhouse, sitting at the Royal Courts of Justice, London.

(2) Railway and Canal Traffic Act, 1913 (2 & 3 Geo. 5, c. 29), s. 1: (1) Where on a complaint with respect to any increase (within any limit fixed by an Act of Parliament, or by a Provisional Order confirmed by an Act of Parliament) of any rate or charge under section one of the Railway and Canal Traffic Act, 1894, the railway company proves to the satisfaction of the Railway and Canal Commissioners—

- (a) that there has been a rise in the cost of working the railway, excluding the cost of carrying and dealing with passengers, resulting from improvements made by the company since the nineteenth day of August, nineteen hundred and eleven, in the conditions of employment of their labour or clerical staff; and
- (b) that the whole of the particular increase of rate or charge of which complaint is made is part of an increase of rates or charges made for the purpose of meeting the said rise in the cost of working; and
- (c) that the increase of rates or charges made for the purpose of meeting the said rise in the cost of working is not, in the whole, greater than is reasonably required for the purpose; and
- (d) that the proportion of the increase of rates or charges allocated to the particular traffic with respect to which the complaint is made is not unreasonable;

the Commissioners shall treat the increase of rate or charge as justified. Provided that nothing in this section shall be construed as preventing the Commissioners from taking into account any circumstances which are relevant to the determination whether an

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(a) what was the total amount paid in respect of goods traffic to their staff for a given week after the said improvements in employment conditions had been made; and (b) what amount would have been paid for such week to the same number of men under the conditions existing prior to August 19, 1911. The resulting excess of (a) over (b) multiplied by 52 (representing the extra payment for one year arising from such improvements) was more by over 40 per cent. than the extra revenue arising from the said general increase of exceptional rates.

Held, by a majority of the Railway Commissioners (Sir James Woodhouse dissenting), that the above method of proof was right, and that it was not incumbent upon the railway company to adopt the method of proof followed in cases relating to increases of rates decided under the Railway and Canal Traffic Act, 1894, namely, to show an increase in the ratio of working expenses to receipts.

Held, further, that, although the railway company had allocated the whole of the increase to exceptional rate traffic, sub-section 1 (d) of section 1 of the Railway and Canal Traffic Act, 1913, did not require that every kind of traffic should bear part of the increase; and that there was no ground for holding such allocation as unreasonable because some of the traders who had their traffic dealt with in this way did not receive all the services for which the extra wages were paid (*e.g.*, cartage and warehousing), or because the exceptional rate traffic did not bear exactly the same proportion to the whole traffic as the increased revenue raised bore to the increased expenditure incurred.

Held, further, the term "cost of working" has no technical meaning.

Held, further, that the increase of rates complained of was justified.

Held, by the Court of Appeal, that the problem presented by the Traffic Act, 1913, did not involve and excluded the general comparisons which had to be made under the Traffic Act, 1894, and that the above decision of the Railway Commissioners ought not to be interfered with.

The applicants carried on business as cement manufacturers at Arlesey, Shepreth and Meldreth, at which places their works communicated with the defendants' railway by means of private sidings. Their traffic, consisting mainly of cement, was consigned at exceptional rates. In accordance with a public notice, dated May 15, 1913, which was applicable to all rates for merchandise traffic, other than coal and coke,

increase of rates or charges is or is not greater than is reasonably required for the purpose of meeting the said rise in the cost of working.

all exceptional rates charged by the defendants were increased by 4 per cent. on July 1, 1913, and class rates were not increased. All exceptional rates on the applicants' traffic having therefore been increased as being part of the general increase of 4 per cent. on all exceptional rates, the applicants applied to the Court for an order declaring *inter alia*, that the increased rates on their traffic were unreasonable. The defendants, by their answer admitted the said increase, and pleaded that the same were part of and in the same proportion as the general increase of rates made on July 1, 1913, and were reasonably required for the purpose of meeting a rise in the cost of working the railways of the defendants, excluding the cost of carrying and dealing with passengers, resulting from improvements made by them since August 19, 1911, in the conditions of employment of their labour and clerical staff, and were justified under the provisions of section 1 of the Railway and Canal Traffic Act, 1913, and/or having regard to the services rendered and received and their value and the trouble and expense and responsibility attending the receipt, carriage, and delivery of the applicants' traffic, there was a change of circumstances justifying such increases; and that such increases were reasonable. The onus of proof being on the defendants, they put in as evidence a statement as follows:—

Rise in the annual cost of working the railway (excluding cost of dealing with passengers) resulting from improvements made between August 19, 1911, and July 1, 1913, in the conditions of employment of their labour and clerical staff ...	£118,588
---	----------

Additional annual revenue derived from the above-mentioned increase in rates	£69,986
--	---------

Difference, being the amount by which the annual cost of the said improvements exceeded the additional annual revenue from the said 4 per cent. increase	£48,602
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In order to prove the annual cost of working their railway (excluding passenger traffic) resulting from the aforementioned improvements made between August 19, 1911, and

July 1, 1913, the defendants put in various statements relating to different departments, namely—

Department.	Total annual increase, excluding staff dealing solely with Passenger Traffic.	Total annual increase attributable to	
		Passenger Traffic.	Goods Traffic.
Locomotive	£ 17,768	£ 7,962	£ 9,806
Engineers'	28,269	14,199	14,070
Traffic	105,399	12,312	93,087
General (Clerical)	832	332	500
Increased contribution to Railway Clearing House in respect of wages, salaries, and superannuation fund ...	1,125	—	1,125
Total	153,393	34,805	118,588

The men employed in each of the above departments were sub-divided into classes according to the work done, thus, for example, the locomotive department was sub-divided into clerical, enginemen, carriage examiners, repair and hydraulic staffs, and a separate table referring to each of such sub-divisions was put in, of which the following is an example:—

ENGINEMEN AND RUNNING SHED STAFF.

Amount paid to staff as appearing in pay bills for week ended June 28, 1913.	Amount that would have been paid under the conditions of service existing on August 19, 1911.	Increase for one week.	Increase per annum.
£7,301	£7,039	£262	£13,624
Cost of additional uniforms, holidays, and other improvements			£244
Total			£13,868

The above sum of £13,868 was allocated between passenger traffic and goods traffic, *pro rata* to engine mileage, namely:

Passenger traffic	...	...	46·87%	...	...	£6,500
Goods traffic	...	...	53·13%	...	...	£7,368

being part of the annual rise in the cost of working arising from the said improvements in the conditions of employment.

The various items relative to the different classes of employees and included in the total sum of £118,588 (representing the annual rise in the cost of working arising from the said improvements) were similarly shown in separate tables. In some cases, as for example the combined passenger and goods staff of the traffic department, the allocation between passenger and goods traffic was made on the basis of gross receipts.

The above annual increase of £118,588 was therefore arrived at by (a) ascertaining the actual amount paid to the relevant staff for the week ending June 28, 1913, and (b) calculating the amount that would have been paid to the same number of men for one week under the conditions of service existing on August 19, 1911, the difference between the two amounts representing such increase in the cost of working for one week, and such difference multiplied by 52 representing the annual increase.

The additional revenue derived from the above 4 per cent. increase in rates was calculated to be £69,986, which figure was arrived at in the following manner:—

Receipts for three days at rates in operation on July 1, 1913, excluding coal and coke	...	£27,927
Receipts for same three days at rates in operation on June 30, 1913, excluding coal and coke	...	£27,183
Increase for the three days	...	£744
Increase per cent. ...	...	2·66

Gross receipts from goods traffic (excluding coal and coke) for year ending June 30, 1914 ... £2,631,055

2·66% of same, being additional revenue for the above year derived from increase in rates ... £69,986

The three days selected for the purpose of the above

table were Monday, November 24, Tuesday, December 2, and Wednesday, December 10, 1913.

The applicants put in numerous tables, and gave evidence for the purpose of showing that an increased scale of wages did not necessarily prove an increased expenditure in wages since no account was taken of a possible change in the methods of working, that a scale of pay was not a guide to the earnings of workmen, that in any case the proportion of working expenses had not been fairly allocated between the different classes of traffic.

G. J. Talbot, K.C., Lynden Macassey, K.C., and Bruce Thomas, appeared for the defendants.

R. Whitehead, K.C., Holman Gregory, K.C., and E. Clements, appeared for the applicants.

The arguments were substantially the same as those in the Court of Appeal. *Post*, p. 127.

LUSH, J.: The question that we have to decide in this case depends mainly upon the construction to be placed upon the Railway and Canal Traffic Act, 1913. The case is one of considerable importance, and a large number of other cases are pending raising substantially the same question. The facts of this case, as far as they are material for our consideration, are not seriously in controversy.

The Act was passed after a grave crisis had arisen in August, 1911, between the railway companies and the men with regard to rates of wages and hours of labour. The position was a serious one; and, in order to provide a way out of the difficulty, it was suggested that if the companies agreed to make the necessary concessions, special facilities would be provided for raising their rates on the carriage of goods. It was accordingly agreed to make the concessions. The Act was passed on March 7, 1913, and, as from July 1, 1913, the increased rates were imposed which are the subject of the present proceedings. The applicants have complained to this Court, and contended that the increases are not justified by the

Act and that no proper or sufficient grounds for making them have been shown by the defendants. Their main contention is that an erroneous method of proof has been adopted by the defendants.

The title of the Act is this: "An Act to amend section one of the Railway and Canal Traffic Act, 1894, with regard to increases of rates or charges made for the purpose of meeting a rise in the cost of working a railway due to improved labour conditions." The declared object, therefore, is to alter the law as enacted by the statute referred to with respect to the particular increases of rates that are mentioned. That it was passed in the interest of railway companies and for the purpose of giving them facilities which they did not possess under the Act of 1894 was not and could not be contested. That Act was passed to restrict railway companies' powers with regard to increasing rates. This Act was passed to enlarge those powers as so restricted.

Now, in order to see what the amendment is that the Act was intended to make, it is necessary, I think, to compare the language used in the two Acts. The first section of the Act of 1894 provided that: "Where a railway company have directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable." Under that Act, therefore, what a railway company has to prove, in order to justify an increase of a rate, is that, having regard to all the circumstances, the new increased rate is reasonable. The recognised method of dealing with that question is this. The volume of traffic in question at the time when the old rate was charged and at the time when the increase was made, has to be considered, also the receipts obtained by working the traffic during those periods, and the cost of working it. In order to compare the present conditions with those which existed at the earlier date, a common unit of comparison has to be found; and

what is done is to ascertain by computing the train mileage and the other necessary factors what the cost of carrying the traffic is per ton per mile, and what the proportionate receipts are. This investigation obviously involves the examination of very elaborate and complicated figures.

The Act of 1913, which, as I have said, is an amending Act, and is to be read with the Railway and Canal Traffic Acts, 1873 to 1894, is very different in its terms. It provides that the Commissioners shall treat an increase of rate or charge as justified if the railway company proves to the satisfaction of the Court four things:—(1) That there has been a rise in the cost of working the railway, excluding the cost of carrying and dealing with passengers, resulting from improvements made by the company since August 19, 1911, in the conditions of employment, of their labour or clerical staff; (2) That the whole of the particular increase of rates or charges of which complaint is made is part of an increase of rates or charges made for the purpose of meeting the said rise in the cost of working; (3) That the increase of rates or charges made for the purpose of meeting the said rise in the cost of working is not, on the whole, greater than is reasonably required for the purpose; and (4) That the proportion of the increase of rates of charges allocated to the particular traffic with respect to which the complaint is made is not unreasonable. There is a proviso to the section, which is as follows: “Provided that nothing in this section shall be construed as preventing the Commissioners from taking into account any circumstances which are relevant to the determination whether an increase of rates or charges is or is not greater than is reasonably required for the purpose of meeting the said rise in the cost of working.” The meaning of this proviso was discussed before us, and its terms were criticised. It was not strictly necessary to insert it, as without it the Court would necessarily have taken any “relevant” circumstances into consideration; but it was obviously added in order to emphasise the fact that the dis-

cretion of the Court is not to be fettered in considering whether the increase is reasonably required for the purpose of meeting the rise in the cost of working. It will be observed that in this Act, instead of adopting the language of the Act of 1894, where the increase is spoken of as being in itself "reasonable," the Legislature has only required that the increased rate shall be reasonably required to meet a definite and ascertainable rise in the cost of working resulting from the improved labour conditions. I agree with Mr. Talbot that that is the real key to the Act. It contemplates that a railway company may have paid higher wages or the same wages for less labour, and thereby increased the cost of working by a certain ascertainable sum, and provides that if they prove that, they shall have an increased rate treated as justified if made for the purpose of meeting that increased cost, subject to the fulfilment of the specified conditions.

Now, what the defendants have done is this. They have made the contemplated improvements, that is, they have agreed to pay and have paid higher wages, and agreed to shorten the hours of work. They have thereby increased the cost in that respect of working the railway, the sum paid being very large. They have not been able to effect any economies by those payments—certainly none of any substance. That was, in my opinion, established by the evidence. To meet this increased cost, the defendants made an increase in the rates, and gave the following evidence with regard to it. They first proved what the total amount actually paid to their whole staff was during a particular week, namely, the week ending June 28, 1913, which was the last week before the increased rates came into operation, taking the various departments and adding them together. They then showed what these payments would have amounted to under the old conditions just prior to August 19, 1911; the excess represented the extra payments made, owing to the improved conditions of labour, for that week. Treating the week as a fair average week, they got at the total extra payment for a

year. They then proved what proportion of this amount represented goods, as distinguished from passenger traffic, according to "engine-miles." This proportion the company says represents the rise in the cost of working the railway (excluding passenger traffic) resulting from the improved conditions of labour. The figure arrived at is £118,588. It should be more. The applicants themselves contended, and clearly correctly, that engine-hours instead of engine-miles should have been taken as the basis in calculating what proportion of that department of expenditure represented goods as distinguished from passenger traffic, and so treating it, the £118,588 is increased to something over £120,000. To provide for this rise in the cost, the company have imposed an additional 4 per cent. on all the "exceptional rate" traffic, that is, not imposing any increased rate on coal, coke and patent fuel, or on class rates. This yields an additional revenue of £69,986. The reason for not imposing any further payment on coal, etc., is that, not many years ago, the rate was raised and litigation ensued. Matters were adjusted and the parties have been working on the new scale since that time. It was thought undesirable to disturb an arrangement so recently made. The reason for not imposing further payment on class rate traffic is, that the rates are already high on that traffic—in most cases not far from the maximum. Moreover, to allocate between different kinds of goods would involve a very elaborate and extensive investigation. The balance of the increased cost, about £50,000, speaking roughly, the company bear themselves. They also, of course, bear all the increased cost with regard to passenger traffic.

The applicants, as I have said, contended that the method adopted is erroneous and that the sum raised is not reasonably required to meet what was said to be the real rise in the cost of working the railway, and that the allocation is not reasonable. I will consider the first two matters together, which will be the more convenient course, and deal separately afterwards with the question of allocation to this particular traffic.

Now, the applicants contend that the defendants have adopted a wrong method of proof, and that they have not given the necessary and proper evidence of a rise in the cost of working the railway. Their case is that the defendants were bound to give evidence of their goods traffic receipts at the time when the increase was made and previously, and to deal, as they would have dealt under the Act of 1894, with the cost of carrying and dealing with the traffic per ton per mile. They have in fact followed precisely the same lines as if the defendants were seeking to justify the increase under that Act and, following those lines, their expert witness endeavoured to convince us, on the materials at his disposal, that an increase amounting to something over £29,000 was all that could reasonably be raised. I do not propose to go into the applicants' accounts or into the evidence. In my opinion the accounts are made out on an entirely wrong basis, and the criticisms on the method adopted by the company are entirely unfounded, based upon an erroneous view of the statute.

The first and perhaps most obvious answer to the applicants' contentions is, that if they are sound, the Act of 1913 has not amended the Act of 1894 in any material particular, and the "amending" Act is made entirely useless and of no benefit whatever to the companies. It was not wanted, if the applicants are right. The applicants' contention imposes upon railway companies the same burden of proving that the increase is reasonable that the existing Act imposed, and the defendants could have justified the increase under that Act. The railway company justified a general increase of rates after the cost of working the traffic had been increased by an improvement in the conditions of labour in the case of *Smith and Forrest v. London and North Western Railway Co.*¹ Mr. Justice Wright pointed out, at page 163, that the case had been contested on the question of the principle of a general increase of rates. In the applicants'

view, therefore, the Act of 1913 has given no concession to railway companies and has made no alteration in the law; the distinction that it draws between passenger and goods traffic is illusory and meaningless, because it makes no change in the law in respect of either. Such a contention appears to me to be quite impossible. It was suggested that as the Act of 1913 said that if the necessary conditions are complied with the Commissioners "shall" treat the increase as justified, an obligation was put upon the Court to allow it and that in that way the companies obtained an advantage. A strange contention that seems to me—that the Legislature should have solemnly enacted, as a concession to railway companies, that if they proved under the existing law that they were justly entitled to increase their rates the increase should be allowed, and that this enactment effected an alteration in the law. Another suggestion was that the Act gave an advantage to railway companies in that it allowed them to deal with one element only in the rise in the cost of working, namely, improved labour conditions; but, as I have pointed out, they could do that before the Act was passed. No real explanation was ever given of the amendment which the Act had made, and no alternative method of dealing with the matter was or could, I think, be suggested and, in my opinion, the criticisms on the defendants' mode of dealing with it were without foundation.

There are other answers, I think, to the contention of the applicants. One is this: the applicants strike the words "resulting from the improvement," etc., out of the Act, and read the section as if it said that the company must prove that there has been a rise in the cost of working the railway. Again, the sum that their expert witness arrived at did not result from the improved labour conditions. It resulted from that and other causes not mentioned in the Act. If the traffic and receipts had fallen compared with the previous years, the rise in the cost of working the railway would be represented by a larger sum than the increased sum paid

for wages. This, in my opinion, is of itself sufficient to show that their method of dealing with the problem is not what the Act contemplates. Lastly, I would point out that the Act deals with and was passed for the purpose of dealing with a particular expenditure (in the shape of higher wages) made once for all, to meet which the power to increase the rates was given. The cases to which the Act of 1894 is applied are, for the most part, cases in which there is a gradual growth of cost as against profit. It is natural enough that in the latter cases the volume of traffic and receipts should be taken into account, but they have, in my opinion, no relation to the subject-matter of the Act of 1913. I quite agree with the applicants' witness when he said that "cost" is not the same thing as "expenditure," in this sense, that larger expenditure may, by leading to a re-arranging of the conditions of employment and thereby effecting economies, be wholly, or in part, prevented from causing to those who incur it a larger cost in working. But, *prima facie*, it increases the cost, and there was nothing in the facts of this case to reduce that increased cost. As I have said, no economy or saving was proved.

There is one argument which was used that I ought perhaps to notice. It was suggested that the words "cost of working a railway" have come to have a technical meaning in this Court, and indicate that the various factors to which I have referred, and which are considered in order to ascertain whether a rate is reasonable, will necessarily be considered in arriving at the cost of working. I disagree entirely with this view. I have dealt with it in effect already. To apply such a rule would make the Act inoperative, and, moreover, it is not correct in law or in fact. The different factors in the problem to which I have referred are no doubt important if the reasonableness of the increase in the rate as such is the question to be dealt with; but the question whether there has been a rise in the cost of working from a specified cause, and its amount, does

not, in my opinion, involve these. I must also refer to the proviso on which the applicants to some extent relied. It does not, in my opinion, assist them. If it had said that the Court shall take into account any circumstances relevant to the question whether the increase in the rate is "reasonable," it might have been said that the Legislature contemplated that the same kind of question would arise and the same methods be adopted as under the Act of 1894 where that expression is used, but it has abstained from doing so and adopted the same expression as appears in the operative part of the section. No contention, therefore, can be founded on the proviso which assists the case of the applicants.

For the above reasons I think the method adopted by the defendants is right, and that that suggested by the applicants is wrong. Having attacked the method adopted by the defendants, the applicants then proceeded to question some of the figures in respect to details. It was said that the "shunting miles" were erroneously dealt with, and that if they were rightly dealt with, nearly £3,500 must come off the £118,588. This was not, I think, made out, and I accept the figures spoken to by the company's witnesses as to this.

Then it was said that it was not a fair mode of ascertaining the increase of cost for a year to take one week and treat it as an average week. I do not think that this was unreasonable. To take the figures out for every week in the year would be an intolerable burden and expense, and the week chosen was not, so far as I can see, other than a fairly representative week. Again it was said that the wages paid to the men employed at the Railway Clearing House were not paid to the railway company's own servants and that these should have been disregarded. But the companies between them contribute to those expenses, and it would have been wrong, in my opinion, to omit them, although this company do not actually employ the staff who work there. Even, however, if the figures should have been reduced by reason of the calculation from the week selected not being strictly accurate

or by reason of the Clearing House staff not being employed by the defendants for the purpose under discussion, it is of no real importance. Making all allowance for errors in detail such as these, there is a large margin, far more than sufficient to justify the rate. The company have, after making all such allowances, proved, in my opinion, that the rise in the cost of working the railway, excluding passenger traffic, resulting from the improved conditions of labour, amounts, approximately, at all events, to £120,000 and, taking all relevant matters into consideration, the £69,000 odd which they have raised in the shape of increased rates was, I think, reasonably required in order to meet that rise in cost.

It remains to consider whether the defendants have satisfied sub-section 1 (d). In other words, is the allocation that they have made in throwing the whole of the £69,000 on to the exceptional rate traffic "not unreasonable"? Now, the sub-section does not, I think, require that every kind of traffic shall bear part of the rate. The company, if they do allocate part to one class of traffic and part to another, or if they do what they have done in this case, make all the traffic which is exceptionally dealt with bear the whole of the increased rate, must show that they have not acted unreasonably. Have they discharged that burden?

Two points were made in this part of the case which deserve consideration. First it was said that to raise the whole amount of the extra cost and charge on one class of traffic only, the exceptional rate traffic, is unfair, because some of the traders who have their traffic dealt with in this way do not receive all the services which are represented in the extra wages paid. Cartage and warehouse services, for example, form a substantial proportion of the whole of the services rendered to and paid for by the public, and some of these traders are not benefited by either. There is no ground, in my opinion, for saying that the allocation is unreasonable on that ground. Some of these traders did not pay for those services before, because they did not receive

them, and a 4 per cent. increase on what they do pay does not involve them in the payment of other services than those they paid for before it was added. The second point is this: Exceptional rate traffic forms a certain percentage of the whole, and it is said that the proportion, or ratio, that it bears to the whole is less than the proportion which the £69,986 bears to the £118,588, or £120,000, so that an undue proportion of the whole increase is thrown upon these traders. Although it may be true that the proportion is somewhat less, I think that the allocation is not unreasonable. The reason for omitting the class rates to which I have referred is a very sound one, as also is the reason for omitting the coal traffic, and I do not think that the Legislature has made it obligatory on the company to observe the exact arithmetical proportion in deciding how to adjust the increased rates. One must look at the matter broadly, and see whether there is anything unreasonable in the result under the circumstances. I do not think that the allocation is unreasonable. Any method adopted would probably be open to some criticism. The reason given for the adjustment or allocation appears to me to be sensible and well founded.

For these reasons, I think that the defendants have justified the increase in the rate, and the application therefore, in my opinion, fails, and the defendants must have judgment on their counterclaim for the unpaid balance of the rates.

HON A. E. GATHORNE-HARDY: I have had the opportunity of carefully considering the judgment of the learned Judge in this case, and as I entirely agree both with the construction he has placed upon the Act, and with the conclusions of fact at which he has arrived, and his reasons for adopting them, I do not think it would serve any useful purpose for me to go into the facts in any great detail.

On the evidence before us, I have no difficulty in finding, as a fact, that there has been such a "rise in the cost of

working the railway" (excluding passenger traffic) "resulting from improvements made by the company since August 19, 1911, in the conditions of employment of their labour or clerical staff" to more than justify the increase of rates made, and I think there is nothing in the wording of the Act to fetter our discretion in arriving at this conclusion of fact. I consider, moreover, that the conditions laid down in the Act of 1913 have been fully complied with.

The Act was a remedial one, passed in the interest of the railway companies to meet a special emergency, just as the Act of 1894 was passed in the interest of the traders for a like reason. Its object was to provide a simple method by which the increased cost of labour might be in some degree shared by the traders and the consuming public; and I think it would be both unjust and inexpedient to give it such a narrow construction as would really render it inoperative, and throw back the companies on the remedy provided by the Act of 1894, which it expressly purports to amend. If there was any evidence that the improved conditions of labour had resulted directly in economies of working which had led to improved results, I should have been ready to take it into account; but there is really nothing to lead to such an inference. Assuredly the Legislature, when it passed these elaborate provisions, must have believed that improvements in wages and conditions of labour would in all probability lead to increased cost of working the railways. I hold that they have done so to the full extent of the rise made.

The learned judge has dealt so fully with the subsidiary points that I have nothing to add.

SIR JAMES WOODHOUSE: The applicants are cement manufacturers in a large way of business. They complain under section 1 of the Railway Traffic Act, 1894, that an increase of rates made by the defendants is unreasonable. Such increase is part of a general increase, not of all rates, but of exceptional rates for goods traffic amounting to 4 per cent.

made by all the railway companies on July 1, 1913, to meet, as they allege, an increase in their expenditure due to higher wages paid and shorter hours conceded to their employees. The defendants by their pleadings justify the increase, first, on the ground that it comes within the special provisions of the amending Railway Traffic Act of 1913 and, secondly, on the ground available under the Act of 1894, that, if regard be had to all the circumstances, it is reasonable.

At the hearing the defendants based their case justifying the increase exclusively on the first ground. As this is the first case since the passing of the recent Act upon which the Court has to pronounce judgment, and as there are a very large number of cases affecting nearly every staple trade in the country pending before the Court raising similar issues, the interpretation to be placed upon that Act and the nature of the proof required from the railway companies under it, are of vast importance, especially to traders who are dependent upon the railway companies for the nature of the material and the accuracy of the figures establishing the justification.

The Act of 1913 was passed to amend the Act of 1894. By section 3 it was enacted that it should be read with the Traffic Acts 1873 to 1894. It has therefore become embodied in and must be regarded as part of the general railway legislation. No part of the Act of 1894, except by implication, has been repealed. The Act of 1913, being an amending Act, it becomes not unimportant (as the parties fundamentally differ about its construction) in ascertaining precisely what amendment is introduced, to consider what were the circumstances which gave rise to such amendment. In order to appreciate this, regard must first be had to the Act of 1894, to the interpretation placed upon it by this Court, and to the considerations applied and the proof required in giving effect to that interpretation.

Prior to the passing of the Act of 1894 all rates below the maxima prescribed by the statutory charging orders were

presumed to be reasonable. That Act took away this presumption and restricted the power of the railway companies to increase their rates, even though they were below the maxima, by requiring them to show to the satisfaction of this tribunal that any such increase was in fact reasonable. No standard or test of what was to be deemed "reasonable" was indicated in the statute; it was left entirely to the Court to evolve the considerations and principles to be applied in deciding, in the exercise of its judicial discretion, what was reasonable. In practice, increases of rates were sought to be justified by showing an increase in the general working cost of the railway affected. The Court laid down that what it had to decide was, not whether the rate was reasonable, but whether the increase was reasonable; and, in order to justify the increase of a particular rate, it was not sufficient for the railway company to show a general increase in the cost of working the railway, but it was necessary to prove that the cost of the particular service relied on in working the particular traffic to which the specific rate complained of referred had increased—*Black v. Caledonian Railway Co.*¹ The onus was thus placed upon the company of showing that since the rate had been in force there had been some "change of circumstances" which imposed a greater burden upon the company, and that that greater burden affected the particular traffic under consideration. As there was no analytical separation in the books of the railway company of expenditure showing what was the cost of working a particular traffic, and, indeed, no separation of goods and passenger working at all, the method of proof resorted to was a most complicated and laborious one, and involved a difficult and unsatisfactory investigation for the Court. As evidencing a general rise in the cost of working, reliance was placed by the railway companies upon the ratio method of comparing, in the contrasted periods, the percentage which aggregate expenditure

bore to total receipts. The apportionment of these figures between passengers, goods and minerals on the basis, as to part, of train mileage, and as to the other part, of gross receipts, in order to ascertain the ratio of particular traffic expenses to particular receipts, involved calculations and tables of a most complex character. This method, as the Court has frequently pointed out, is very sensitive to error, as the introduction of the slightest disturbing element on either the receipt or expenditure side of the account altered the ratio, subjected the process to much suspicion, and only made it acceptable after the closest scrutiny and because no better method could be suggested. Much of the difficulty no doubt arose from the fact that railway accounts were only kept in the form necessary to satisfy the statutory provisions of the Railway Accounts Act. Such accounts were very insufficient and afforded very little assistance in solving the issues which arose under the Act of 1894. The old statutory tables contained practically only two elucidating factors (first the percentage of expenses to gross receipts, and secondly the number of train-miles)—which fell short of what was required to be known, to arithmetically determine the real cost of transportation. Cumbrous and dubious as was this method of solving the problem, no better one was ever suggested or devised, and the Court had to arrive at the best judgment it could, after listening to all the adverse criticisms which eminent counsel and expert statistician on behalf of traders could offer for their consideration. Nor do matters appear to have been very much improved by the new form of accounts prescribed by the Railway Accounts Act, 1911. In that year (1911), owing to the railway companies refusing to concede the demands of their employees, the great railway strike took place. It is notorious that the Government, who were at that juncture face to face with a serious crisis both national and international, intervened, and made strenuous and successful efforts to bring the strike to an end. The representatives of both parties came to terms, and in connection with the

settlement the Government promised the railway companies to introduce a Bill to amend the Act of 1894. The present Act, passed nearly two years afterwards, was the outcome of that arrangement.

We have now to interpret what it means. I confess that I have felt not a little difficulty, judging from the ambiguous language of this statute, in discovering what the real intention of the Legislature was. It is obviously on the face of it an attempt to harmonise and embody two conflicting views—those of the companies and those of the traders who strenuously opposed it. This amending Act deals with the same subject-matter as section 1 of the Act of 1894, *i.e.*, complaints as to “any increase of any rate”; but, as its amplified title denotes, the only increase of rate which comes within the scope of its provisions is one due to improvements in labour conditions. There is nothing in the Act to limit its operation to the emergency concessions made at the time of the strike settlement in 1911 or in the subsequent year. Whatever be its effect, it is not transitory but permanent in its operation: it applies not only to concessions then made, but to all future increases of rate occasioned by a reduction of hours or increase of wages affecting the labour or clerical staff. It enacts that on any complaint as to any such increase, in order to justify it, the railway company must prove: (a) That there has been a rise in the cost of working the railway due to improvements in the conditions of labour made since August 1911. (b) That, in ascertaining such cost of working the railway, all the cost of carrying and dealing with passengers has been excluded. (c) That the whole of any particular increase complained of is part of the above general increase. (d) That the increase of rate is not in “the whole” greater than is reasonably required to meet the said rise in the cost of working the railway. (e) That the proportion of the increase allocated to the particular traffic, with respect to which the complaint is made, is not unreasonable. There is a material proviso in the section, which I will deal with subsequently.

The first question is, What is meant by the expression "rise in the cost of working the railway" due to improved labour conditions? It is the first time the expression "cost of working the railway" has found its way into railway legislation, but it has been a common formula in the discussions before this tribunal when hearing complaints under the Act of 1894, and it has received judicial examination and interpretation with which the Legislature must be assumed to have been familiar. Under the term "cost of working" are included such elements of expenditure as (a) coal and fuel, (b) labour, (c) maintenance of permanent way, (d) repairs and renewals of rolling stock and engines, (e) general traffic expenses chargeable to revenue. But "expenditure" and "cost" in this connection must not be confused. They are not convertible terms. "Expenditure" is a debit factor—it refers to outlay only, and is absolute. "Cost" is a resultant and comprehensive factor, and is relative. It embraces economies made, as well as money expended. Part of the "expenditure" of operating a railway consisting of fixed and certain charges is constant, another and greater part, including fuel and labour, is variable, and it is obvious that it must vary with the volume of traffic. "Cost" is unknown until volume is ascertained, and volume is always fluctuating. The business of a railway company is that of carrying and handling traffic. That is the object or purpose for which rates are charged. This is clear from the words expressly excluding passenger traffic from the purview of the amending Act—the words being "excluding the cost of carrying and dealing with passengers." The great bulk of these rates are in the statutory Charging Orders measured in money in relation to weight and distance—that is, in tons and miles. It is axiomatic that each ton of freight added to the existing traffic costs relatively less to haul. The cost of working grows less rapidly than the volume of business done. Neither fuel nor labour expand *pari passu* with the paying load. Similarly the rate of increase of earnings per mile is much greater than the

increase of expenses. To ascertain then the cost of working a railway in comparable periods, some relative standard, or unit, of comparison must be taken. As Lord Collins said in *Rickett Smith's Case*¹: "The expense at which traffic is carried must be a relative figure and, being relative, I think that its relation to receipts in two contrasted years may afford a comparison, unless there be some disturbing element to upset the calculation." In that case the railway companies to compare the cost of working adopted the ratio of expenditure to gross revenue as their best unit of comparison. In this country in all railway accounts and at all railway meetings it has been taken as the invariable standard. In this Court efforts have been made to apply other tests, such as that of tonnage carried and the train-miles operated; but invariably for the purpose of ascertaining whether or not there has been a rise in aggregate working cost between two contrasted periods, one or all of these units of comparison have been examined and compared. Such was the basis of comparison as exemplified by Mr. Justice Wright's judgment in *Smith and Forrest's Case*.² It is, of course, one of the difficulties inherent in the system on which the railway companies keep their accounts, that they cannot present such statements of cost with arithmetical accuracy, but they can only estimate them approximately.

Now Mr. Talbot, for the railway company, contends that the amendments the Act introduced were (1) to enable a general increase of rate under ascertained circumstances to be made, and (2) that the machinery or method for ascertaining those circumstances and justifying the increased rate was different machinery from that used under the original Act. So far I agree; but the issue turns on how the machinery differs, and that depends on the construction to be placed on the Act.

As was well established under the prior Act, the increased

(1) *Ante*, Vol. IX., at p. 117.

(2) *Ante*, Vol. XI. 156.

cost of any particular element—be it, *e.g.*, coal, or be it labour—which formed the real ground of justification for an increase of rate (be the rate of general or particular application)—must be related to and proved in respect not of the entire traffic, but of the particular traffic to which the complaint related. This, as I have stated, was a matter of enormous trouble and complexity. What the railway companies desired was to simplify the machinery for increasing their rates by being relieved, if they could, of relating their working cost to any particular traffic, or any particular portion of their railway, so as to limit their arithmetical analysis as regards labour to their traffic as a whole.

I think that the amendment the Act introduced carried out this object and made it sufficient if the railway company primarily proved what the rise had been in the working cost of labour with respect to its entire traffic, which was a very different proposition and one capable of very much simpler proof. How traffic fluctuated from one period to another and varied in particular districts was evidenced by Mr. Gresley, the railway company's Chief Locomotive Engineer. In some districts of a railway system he said it is up, in other districts it is down. These variations (if my view be correct, that cost varies with the work done—that is, with its volume and density) would make the percentage of cost of service on a portion of the traffic entirely different from what it would be relatively to that of the entire traffic. Again, the defendants are restricting this increase of rate to what is known as exceptional goods traffic, excluding ordinary class-rate traffic, coal and coke traffic. The exceptional rate traffic we are told constitutes about 80 per cent. in volume of all goods traffic and 69 per cent. in money value; but, as was admitted by Mr. Jepson, the able and experienced traffic manager of the London and North Western Railway, class-rate traffic is more expensive to work as regards labour than is exceptional rate traffic. Under the original Act, this work-

ing cost would have had to be gone into in detail and the exact cost brought home, in the manner I have previously described, to the particular class of traffic. You now use simplified machinery of proof, limited as regards elements of expenditure to labour and, as regards traffic, to the entire traffic (excluding passengers) as distinct from a particular traffic. That is the relief and benefit which the railway companies obtained under the Act; and only those who, like myself, for some years have had to adjudicate on these cases can properly appreciate what a real advantage to them it is. I have dwelt on this because it is asked, if the railway company's method of bringing themselves within this section is not accepted, what benefit have they obtained? In my view a very substantial benefit by being relieved of the onus of showing the effect, so far as labour is concerned, in regard to a particular rate, or on particular traffic, of its actual cost.

Now for the applicants it has been argued, with great force and clearness by Mr. Gregory, that under the Act of 1913 the company must first prove what has been the entire general cost of working the railway (excluding the cost of passenger traffic), secondly, that there has been a rise in such general cost of working and, thirdly, that that rise has been due to improved labour conditions. The effect of this would be, that the Court might find, that whilst the labour cost had risen, the cost of other operating elements had fallen to such a degree that there was no rise, in comparable periods, in the general working of the railway which therefore would preclude the railway company's right to any increase. Though a possible construction, I think that it is not the true construction of the section.

The wage element is all we have primarily to deal with. Has there been a rise since 1911 in the cost of working, due to improved labour conditions—in other words, to an increase of wages? The Act cannot mean merely the rise in the aggregate of extra payments to labour in any period compared with the corresponding period in 1911, because the aggregate

must obviously depend on the volume of work done. It is not a rise in mere expenditure that we have to deal with, but a rise in the cost of working. It is clear that there may be a rise in the cost of working the railway resulting from a particular cause, viz., improvement in labour conditions, although,—owing to economies in other directions, *e.g.*, improvements in methods of working, or the fall in price of coal, or other materials, or reduced mileage,—the aggregate cost of working the railway may have diminished. It is also equally clear that, notwithstanding improved conditions, there may be a fall in the cost of labour, though owing to the rise in fuel or other elements, the aggregate cost of working the railway may have increased.

Let me, simply by way of illustration, take examples collected from the published returns of the leading railway companies for the second half-years respectively of 1911 and 1912, when what I call the emergency concessions had become operative. The comparison for the first half year of 1912 would not be in point, as the disturbing element of the great coal strike took place in March and April 1912. For convenience of reference these figures are tabulated in the *Times* of February 10, 1913.

Take the last point first. On the North Staffordshire Railway the percentage of total expenses rose from 60.57 in 1911 to 62.40 in 1912, whilst the ratio of wages and national insurance fell from 25.21 in 1911 to 25.05 in 1912; but the cost of fuel rose from 3.97 to 4.48. On the Great Central the total expenses fell .90 per cent., wages fell from 34.01 to 33.36; but fuel increased from 7.06 to 7.60. On the North Eastern the total expenses fell from 62.39 to 61.86, whilst wages fell from 27.03 to 26.83, though fuel increased from 4.29 to 3.75. These figures do not, of course, separate the expenses of passenger traffic from that of merchandise; they deal with the railway as a whole; but they are illustrative of the observations I have made, and it is solely for that purpose I refer to them. But if, on the proper interpretation

of the Act, the railway company must show that the cost of working has risen since 1911, the comparison must be made, not on the basis of aggregate cost, but on unit cost in some form. What the Act, I think, means is, that the railway company must primarily show that the same amount of traffic has cost the company in labour more to work. It must, as Lord Collins said,¹ be a relative figure. The rise in the cost of labour must be viewed relatively to the volume of work done, *i.e.*, to the tonnage carried, to the train-miles run, or to the ratio which such increased expenditure on labour bears to gross receipts. There must be some criterion or standard of measurement, or some unit for comparison between 1911 and the latter period. The subject-matter is traffic,—it is a variant, not a constant. If it were a constant, then the method of arriving at a result would be simpler. You measure the working cost of labour by ascertaining how much it cost you in labour in 1911 to carry and handle a ton of goods on your railway; or how much it cost you in labour to earn a £100 of receipts. If in 1913, taking the same unit, it cost you more, then to the aggregate extent of that rise in the cost of working the railway due to labour improvements, you may make a general increase of rate. Suppose, as a rough illustration, it cost in labour 1d. to carry a ton of goods a mile in 1911 and it is shown that in 1913 it costs, owing to improved conditions, $1\frac{1}{4}$ d., that would *prima facie* justify an increase of 25 per cent. There would be a definite ascertained rise in the cost of working, *i.e.*, in carrying the traffic.

As the real question at issue in this case is one of principle, *viz.*, that of the proper interpretation of the amending Act, I purposely abstain from going into the figures more than is necessary, or of dealing with "allocation" under sub-section 1 (d). If the view I have stated be correct, as I think it is, we admittedly have not had placed before us by the defendants the necessary material upon which to arrive at a

(1) See Rickett Smith & Co. *v.* Midland Railway Co. *Ante*, Vol. IX. at p. 117.

judgment. We have not got, for example, the actual wages paid by the railway company in 1911 and 1913 respectively for traffic (other than passenger traffic), which in my view are essential to relate the volume of traffic to tonnage or revenue, so as to show the rise in the cost of working due to labour improvements. On the last day of the hearing the company did put in a statement "F," which showed that their gross earnings between 1911 and 1913 had increased £495,956, or 7.69 per cent., and that the gross wages had increased £217,075 or 9.18 per cent. This statement showed that the ratio of gross wages to gross receipts advanced from 36.63 per cent. in 1911 to 37.14 per cent. in 1913, or .51 per cent. This rise in the labour cost of working the railway, as tested by the ratio of expenditure to receipts, so far as figures supplied by the railway company are concerned, is the only test from them which we have. These figures are, however, quite insufficient for the purpose of justifying the increase or rate under the Act. In the first place they do not exclude, but include, passenger working; and, in the next place, they include figures relating not only to carrying and dealing with traffic, but to all businesses of the company, including those of canals, hotels, and warehouses. What the figures are relating to the relevant factor under the Act the railway company do not give, and they say they can only give them with an immense amount of trouble; but, whatever be the trouble (which I think is a good deal exaggerated), they are to my mind essential to the ascertainment of the proper facts upon which the real determination of the issue depends.

The defendants interpret the Act in a different way. They in effect say that what was intended was to standardise the price of labour in August 1911. (I say *price*, because whether the hours worked are shorter or longer they are expressed in the equivalent of money.) Thus they ascertain how much per hour they pay signalmen, how much engine-drivers, how much fremen, according to the standard and conditions of 1913 in one particular week, and multiply the results by 52.

They find a man worked so many hours; of those hours they ascribe so many to ordinary pay and so many to overtime pay; with this they compare and contrast what they would have paid the same man working in the same grade under the conditions of 1911, at the prices then prevailing, when the relation of ordinary time to overtime was quite different. The aggregate difference when thus ascertained represents, in their view, the increase in cost of working resulting from labour improvements; and in the event of increased traffic involving the appointment of additional men, the railway company, it is claimed, are under the Act entitled to recoup themselves for any increase of wages paid to these additional men over the standard of 1911, although they get the benefit of increased receipts from the carrying of additional traffic. Thus whether traffic increases or decreases, whether receipts rise or fall, whether the result of working the railway is more prosperous or less prosperous becomes, according to their view, immaterial. The sole question involved (according to this view) is: are we paying at a higher rate per hour for our particular grade of employee than we were paying in 1911. If so, then the sum of the differences represents the increase in cost of working which we are entitled to get back in increased rates from the trader. If they establish the above fact, it is according to their contention mandatory on the Court to allow it. This was the view, as I understood it, pressed upon us by Mr. Talbot. I cannot understand why, if this be the simple view intended, the Legislature did not find less ambiguous language, having regard to the discussions before this Court as to the cost of working, in which to express it. But, as I have said before, the payment of an increased scale of wages does not necessarily increase the cost of working. It does not necessarily do so when the subject-matter, namely, the work done, is constant; still less so when that work, as in the case of a railway company, varies.

Let me take a simple illustration. Suppose A. has a large garden with extensive lawns which are mown by hand

machines and that ten men are employed at wages averaging £1 5s. 0d. each, amounting in the aggregate to £12 10s. 0d. a week, or £650 per annum. A decides to improve the condition of his workmen by giving them each 3s. per week extra; but, being desirous of not increasing the total cost of working his garden, resolves to buy a motor lawn mower, by which, with three fewer men and in less time, he can do what he did before. He pays seven men an additional £54 12s. 0d. per annum; but owing to the reorganisation of his labour and the introduction of a labour-saving machine, he has been able to reduce the aggregate labour cost from £650 per annum to £509 12s. 0d. or £140 8s. 0d. per annum; and, after debiting a sum for interest on capital expended on the machine and its depreciation and upkeep, his total outlay is less. Here there have been increased wages paid in respect of the labour actually employed owing to increased scales of pay; but there has been, on the actual facts, no rise in the cost of working. All the railway company do is to place before the Court the number of men employed in a particular week in 1913 and price out their wages under the conditions of 1913, and say, assuming the same number of men had been working the same number of hours in 1911, they would have been paid so much less and the estimated difference, when multiplied by 52, shows an increase which represents the rise in cost of working. The objection is taken that this is an artificial and misleading method of arriving at the result required to be known, and I think it is. It does not deal with or show what is the actual state of things in 1911 at all. An illustration of this was exemplified by one of the defendants' tables showing the increase in the Locomotive Department, where on investigation it was shown on the face of the table that whilst 308 men in 1911 were getting £830, 314 men in 1913 were getting only £806, notwithstanding the increased scale of pay. The explanation made by Mr. Gresley, the company's engineer, is, that more work must have been done in 1911; but that gives point precisely to the criticism that you cannot

accept the defendants' method of establishing a rise in the cost of working without knowing other factors which are not disclosed.

I agree with Mr. Fells, an experienced railway accountant called by the applicants, that scales of pay not infrequently determine practically the quantum and, therefore, the cost of labour employed, and a useful table put in by him shows how this might operate in practice. If labour is dearer, a business man tries to see whether he cannot so organise his business as to reduce its cost without diminishing the product.

This was evidently the idea which the chairman of the defendant company, one of the most painstaking, practical, and prescient of railway chiefs, had in his mind when, according to the evidence, he said to his shareholders in 1912, apropos of increased wages: "The company would have to pay a great deal more in wages, and it would inevitably impose upon the General Manager and all concerned the duty of finding and using all expedients to effect economy in labour." This was not the expression of a pious hope; it was the business man's determination to face the actualities of the situation; and, coming from such a source, it will be surprising if it is not reflected in the results, when figures, which are not yet forthcoming, are presented, as I think they should be, for investigation.

To compare one period with another to see whether his labour in the later one is costing him, notwithstanding higher prices, more or less than in the former, the business man deals with the actual facts as they are, and does not seek to ascertain what would have been the fact if he had applied present conditions to a former period of working. What was the actual labour cost in 1911? What were the actual wages paid for the carrying and dealing with the traffic in question? What were they in 1913? What was the tonnage carried? What were the miles operated? What were the receipts obtained? To ascertain whether the working cost of traffic has increased, you must know the relative volume and density

of the traffic in the contrasted periods and the receipts derived from it; and these facts have certainly not been shown.

But whichever be the right view of this section, the proviso in section 1 has still to be considered. It was argued by the defendants' counsel that it had no effect and should be regarded as surplusage, on the ground that the Court would, in any event, take all relevant circumstances into consideration. But I think it has a very important bearing on the interpretation to be placed upon the Act. This legislation is so recent and was the subject of so much controversy, that one cannot shut one's eyes to the fact, well known to all who followed the course of events, that this proviso (as is apparent on the face of it) was introduced at the instance of, and for the protection of, the trader. It relates by its very terms, not to a lettered sub-section, as was suggested, but to the whole preceding enacting words of the section, and was obviously intended to have a limiting effect upon it. That limiting effect was, in my humble opinion, to retain in the Commissioners the same right and to impose upon them the same duty—when determining what was reasonable in reference to the quantum of the increase as regards a general increase of rates to meet an increased cost of working due to labour improvements under the amending Act—of considering such general circumstances as had been deemed relevant when considering whether an increase was reasonably required under the original Act. Under this proviso the applicants would be entitled to show, and the Court to consider, whether there were not compensating circumstances resulting from increased expenditure on labour, such as the productivity of the labour involved and any economy thereby effected; and it would be open to the Court to consider and in its discretion to determine, whether, though in fact labour expenditure had risen, yet the general cost of working the railway had so fallen that to put on the trader so large a cost as proposed was not a reasonable requirement: Mr. Talbot contended that it was neither the right nor the duty of the

Court to entertain under this Act the economic factor at all. Again, suppose the rise in expenditure on labour was not directly connected with working the railway, that is, with the cost of carrying and dealing with traffic, or earning the receipts, but was due to some sudden unforeseen and non-concurrent factor happening only in one year, or in two, of a series of years; or was due to some experimental and unproductive purpose, and did not concern the regular machinery of working, would not those be relevant circumstances which the Court should consider?

It should not be forgotten that, in this country, rates are not made up on any scientific or mileage basis, but on a purely artificial basis. They are not based on the cost of service; they are based on the commercial value of the service, that is, according to what the traffic will bear. Thus whilst a small percentage increase on high class traffic will not relatively be seriously felt, when you come to deal with a low grade traffic like cement, a small addition may make all the difference between a working profit and a loss. Such circumstances in my view are very material and relevant circumstance from the business point of view in ascertaining whether (though there has been a rise in the cost of working as regards labour) the increase of rate made by the company is, or is not, greater than is reasonably required for the purpose of meeting such rise.

From the way the defendants' justification was presented to the Court, the restricted character of the proof, and the limitations contended for, it was obviously directed to forming a guiding precedent in all future cases. This is a Court of law which sits to determine legal rights and obligations in accordance with legal principles, but it is also a business tribunal, which ought not to ignore the principles of economics. It is because I feel convinced that it would be unsound in principle and unsafe in practice to accept the defendants' construction of the statute, as exemplified by their method and argument, that I have come to the con-

clusion that they have not discharged the onus which rests upon them, and that on this application the applicants are entitled to succeed.

The applicants appealed.

R. Whitehead, K.C., Holman Gregory, K.C., and E. Clements, for the appellants:

The defendants' tables show an increase in expenditure only, but increased expenditure does not necessarily mean an increased cost of working. Cost of working varies, and before it can be ascertained it is necessary to know what amount of work has been done for a given expenditure. There is no evidence on this point, and, further, there is no evidence that there has been any rise in the cost of working as between the two contrasted dates. The Act of 1913 is intended to amend the Traffic Act of 1894 and has to be read with it. The practice followed in cases decided under the older Act is therefore material, and that practice has been to compare the ratio of expenditure to receipts at the material dates, or in other words to ascertain what is the cost of working, relative to work done—see *Rickett Smith & Co. v. Midland Railway Co.*,¹ *Charlaw and Sacristan Collieries Co. v. North Eastern Railway Co.*,² *South Yorkshire Coal Owners' Society v. Midland Railway Co.*,³ *Smith and Forrest v. North Western Railway Co.*,⁴ and *Society of Coal Merchants v. Midland Railway Co.*⁵ The same procedure has been adopted in cases where railway companies have applied under Special Acts for sanction to increase their rates—see *South Eastern and Chatham Railway Co., Ex parte*,⁶ and *Great Southern and Western Railway Co., Ex parte*.⁷ In this way "cost of working" has acquired a

(1) *Ante*, Vol. IX. 107; [1896] 1 Q. B. 260.

(2) *Ante*, Vol. IX. 140.

(3) *Ante*, Vol. X. 28.

(4) *Ante*, Vol. XI. 156.

(5) *Ante*, Vol. XIV. 100.

(6) *Ante*, Vol. XV. 154.

(7) *Ante*, Vol. XV. 282.

special meaning, and regard must be had to this meaning in construing the Act of 1913 which benefits railway companies by excluding a consideration of all factors except that of the cost of labour.

Sir J. Simon, K.C., G. J. Talbot, K.C., and Bruce Thomas, for the respondents:

The rates of wages paid in 1911 are not material; the only point with reference to that year is that the improvements in labour conditions must have been made since August, 1911. The question is, What would the wages bill be to-day, and not in 1911, if these improvements had not been made? In the railway company's figures the traffic factor is constant because it is assumed that the same amount of traffic is worked under both scales of pay. The object of the 1913 Act was to enable the railway company to justify an increase of rates by proving an increase in their wages bill instead of making the elaborate calculations required under the Act of 1894.

The judgment of the Court of Appeal (Lord Cozens-Hardy, M.R., Phillimore, L.J., and Sargent, J.) was delivered by:—

LORD COZENS-HARDY, M.R.: This appeal raises a question of far-reaching importance as to the true effect of the Railway and Canal Traffic Act, 1913. It is desirable to consider the material provisions affecting traders and railway companies prior to 1913. Under the Railway and Canal Traffic Act of 1894 a railway company which, after December, 1892, increased a rate or charge was bound, in the event of a complaint being made by a trader, to prove that the increase of the rate or charge was reasonable, and it was not sufficient to say that the rate or charge was within the fixed limit of charge. The burden of proof was thrown upon the railway company. In order to justify the increased charge it was usual for the Commissioners to consider all the circumstances of the railway at the time when the increase was made,

including the receipts of the railway and the expenditure of the railway.

The method usually adopted was to ascertain at each of the two periods the cost of carrying the traffic per ton per mile and the relative resulting receipts. This obviously involved an extremely elaborate calculation. It allowed the setting-off against one increase of expenditure a saving on another item. For example, if expenditure on labour had increased, but the cost of coal had diminished, the company could not succeed to the full extent of the increase of the labour bill without allowing for the saving on coal. The Act of 1894 was, on its face, designed for the benefit of traders, and the task imposed upon the railway companies, and also upon the Railway and Canal Commissioners, was very heavy.

In 1913 it appears on the face of the Act that the railway companies had made improvements in the conditions of employment of their labour, or clerical staff, and the Act was obviously designed for the benefit of railway companies with reference to an increase of their charges for goods traffic. This appears on the face of the Act itself. It has been stated by counsel on both sides, and it is a matter of general public knowledge, that a great strike on the railways in this country was averted by the grant of certain improved conditions upon a promise by the Government to introduce a Bill, the effect of which might be to enable the railway companies to throw the whole or part of the extra cost upon the traders. It is not necessary to consider whether all this can properly be taken into consideration in construing the Act. The Act itself contains sufficient for the purpose.

Before reading the words of the Act it is well to point out one or two matters. In the first place, the Act has no reference to improved conditions prior to August 19, 1911. This is the sole object for which August 1911 is inserted in the Act. In the second place it excludes the general investigation which was customary under the Act of 1894. In the third place the Act of 1913 is to be read with the

Act of 1894, and the provisions of the Act of 1894 remain in force except so far as modified by the Act of 1913. Section 1, sub-section (1), of the latter Act, is as follows:—“Where on a complaint with respect to any increase (within any limit fixed by an Act of Parliament or by a Provisional Order confirmed by an Act of Parliament) of any rate or charge under section 1 of the Railway and Canal Traffic Act, 1894, the railway company proves to the satisfaction of the Railway and Canal Commissioners (a) That there has been a rise in the cost of working the railway, excluding the cost of carrying and dealing with passengers, resulting from improvements made by the company since the 19th day of August, 1911, in the conditions of employment of their labour or clerical staff, and (b) that the whole of the particular increase of rate or charge of which complaint is made is part of an increase of rates or charges made for the purpose of meeting the said rise in the cost of working, and (c) that the increase of rates or charges made for the purpose of meeting the said rise in the cost of working is not in the whole greater than is reasonably required for the purpose, and (d) that the proportion of the increase of the rates or charges allocated to the particular traffic with respect to which the complaint is made is not unreasonable; the Commissioners shall treat the increase of rate or charge as justified.” This section imposes upon the Commissioners the obligation to allow an increase of the charge provided the four conditions there specified have been satisfied. There follows a proviso which, in our opinion, does not assist either side.

The Great Northern Railway Co. increased their rates on what is called “exceptional” traffic by 4 per cent. as from July 1, 1913. No point is made on the ground that the increase is limited to “exceptional” traffic. The traders have complained, and they contend, that the increased rate is not justified, or rather that the railway company have not adduced any evidence on which the Commissioners could

come to the conclusion that the conditions precedent, and particularly condition (a), have been satisfied. The Commissioners by a majority allowed the increase.

Two views have been put before us as to the meaning of the section. On the part of the traders it is argued that the phrase "cost of working" the railway is a term of art referring to the previous practice under the Act of 1894, that it involves many other factors besides the labour bill and that it necessitates a comparison between two periods, viz., 1911 and 1913, including in particular actual receipts and actual expenditure at each of the two periods, and that, unless such evidence is furnished, the Commissioners have no justification for sanctioning any increase of rates. On the other hand, it is contended by the company that the task imposed upon the railway companies, and upon the Commissioners, may be discharged in a much more simple manner, such as the following, which is the method adopted by the Commissioners in the present case. Take the actual figures in July 1913, and see how far the work then done by the railway company in connection with goods traffic has cost more than it would have cost if the conditions had not been improved since August 1911. Mr. Justice Lush, with whom Mr. Gathorne-Hardy agreed, took the latter view, and in our opinion it is the correct view. It seems to us that the isolated problem presented by the Act of 1913 does not involve, and in truth excludes, the general comparison which has to be made under the Act of 1894. The company deliberately omitted to furnish any such evidence as would be necessary to justify an increase under the Act of 1894 based in some form or other on a comparison of two periods, and in our opinion they were right in so doing. It has not been attempted to work out figures with exactness, but a great number of instances have been taken, and typical specimens have been selected for the purpose of the argument. For example, Spalding has been taken as a station in a particular week in 1913, the number of the staff employed for the

purpose of goods traffic is given, the wages paid including payments for overtime and Sunday labour, are stated, and it is then stated what payments would have been made to these men, doing this very work, if the 1911 conditions had been in force, and the result is worked out. We should add that the improved conditions include an actual increase of pay for a standard day and also a diminution in the hours of a standard day. It is said that there is a fallacy in taking the increase of the wages bill as a true test, because the labour may be more efficient by reason of the improved conditions and there may be various economies effected. In point of fact, the evidence is clear that there have been no such economies. It may theoretically be true that the improved conditions may, in the case of certain individual workmen, make them more energetic and better workmen. This, however, is not a practical consideration, dealing as we are with some 20,000 workmen, who are, speaking generally, the same as they were before.

Assuming the general principle submitted by the railway company and adopted by the majority of the Commissioners to be correct, the increase of 4 per cent. is reasonable, after allowing a considerable margin for errors. It must never be forgotten that the Commissioners are the sole judges of fact, and that our jurisdiction is limited to questions of law. If we were satisfied that the Commissioners have misconstrued the Act of Parliament, it might be our duty to send the case back to the Commissioners with a proper direction, or, in some peculiar circumstances, there might be sufficient material before us to make the precise order which, in our view, the Commissioners ought to have made. Short of this we ought not in any way to question the finding of the Commissioners. It is they who must decide whether the proposed increase is reasonable. In the present case they have decided that all the four conditions mentioned in section 1, sub-section (1), have been satisfied, and they have, in the

language of the section, "treated the increase of rate or charge as justified."

In our opinion, there was no misdirection on the part of the Commissioners and their decision ought not to be interfered with. In arriving at our conclusion we have not failed to consider the dissentient judgment of Sir James Woodhouse. The appeal must be dismissed with costs.

Solicitors—Neish, Howell & Haldane, for the applicants; R. Hill Dawe, for the defendants.

ANGLO-AMERICAN OIL CO., LIM. v. CALEDONIAN RAILWAY CO. AND NORTH BRITISH RAILWAY CO.¹

Undue Preference—Distinction between Manufacturer and Merchant—Damages—Complaint within year of discovery—Date from which order runs—Railway and Canal Traffic Act, 1854, s. 2—Railway and Canal Traffic Act, 1888, ss. 12, 13, 27, sub-s. 2.

June 17, 1915. May 16, 1916.—Preferential rates in favour of certain oil-producing companies were defended on the ground, *inter alia*, (a) that they originally were fixed with a view to the development of a new industry, and were necessary, therefore, in the interest of the public, and (b) that the traffic of the applicants, who were merchants, was not comparable with that of the producing companies, who were manufacturers.

Held, the rates complained of could not be justified, and that they constituted an undue preference.

Held, further, that the proviso in section 12 of the Railway and Canal Traffic Act, 1888, which enacts that damages shall not be awarded unless complaint has been made within one year from the discovery by the party aggrieved of the matter complained of, applies to a claim for damages in respect of undue preference.

(1) Before Lord Mackenzie and Commissioners the Hon. A. E. Gathorne-Hardy and Sir James Woodhouse, sitting at the Parliament House, Edinburgh.

Held, further, that the order requiring the defendant railway companies to desist from giving an undue preference took effect from the date of the order, and not from the date of the application.

This was an application under section 2 of the Railway and Canal Traffic Act, 1854, complaining of undue preference and claiming damages in respect of the same.

It was admitted that the defendant railway companies carried for various companies manufacturing oil in Scotland their finished and unfinished products—including lubricating and burning oils, benzine, and motor spirit—at considerably lower mileage rates than those charged to the applicants. The rates charged to the Scottish oil companies had been fixed by agreements with the several companies. These agreements in most cases had expired, but the agreed rates remained in force subject as from July 1, 1913, to a general increase of 4 per cent., which the oil companies had refused to pay. The applicants also alleged that there was keen competition between themselves and the Scottish oil companies, and that there was no difference in character between their respective traffics. The railway companies sought to justify the preference given to the Scottish companies on the ground—

1. That the agreements between them and the Scottish oil companies had been entered into in or about 1871, with the object of securing this traffic in the interests of the public by establishing and developing a new industry, and giving employment to large numbers of workmen and others.
2. That there was no real competition between the applicants and the Scottish companies.
3. That the rates charged to the Scottish companies were fixed as a whole, having regard not only to outward traffic but to inward traffic in raw materials, and other incidental traffic.
4. That the rates charged to the Scottish companies were confined to manufacturers and were not granted to the applicants, and other traders, who were merchants only.

With regard to the claim for damages, the railway companies alleged that the applicants had been aware of the matters complained some years before the date of the application, and that damages were not recoverable under section 12 of the Railway and Canal Traffic Act, 1888. Instances of the rates charged are given in the judgment of Sir James Woodhouse.

R. S. Horne, K.C., and *D. Jamieson* appeared for the applicants.

J. A. Clyde, K.C., and *T. A. Gentles* appeared for the Caledonian Railway Co.

H. Macmillan, K.C., and *E. O. Inglis* appeared for the North British Railway Co.

LORD MACKENZIE: It is not disputed that the rates charged by both the respondent companies to the applicants are in excess of those charged by them to the Scottish oil companies. In the case of burning and lubricating oils the difference ranges, in the instances taken (omitting Falkirk) from 18 to 33 per cent.; in the case of naphtha, which includes motor spirit, the difference is greater, ranging from 123 to 181 per cent.; in the case of returned empties the difference is between 31 and 109 per cent.

The answer of the respondents to the applicants' complaint that this difference in treatment constitutes a preference and an undue preference is twofold—(1) that having regard to the origin, history, and conditions of the traffics in burning and lubricating oils, the difference in the rate charged to the Scottish oil companies, who are manufacturers, and the applicants, who are merchants, amounting on an average to 25 per cent., is justified, and (2) that as regards the new industry in motor spirit, there is no competition between the applicants and the Scottish oil companies, and therefore no ground of complaint. No separate ground of justification was maintained as regards returned empties. These, it was said, should follow the fate of what is forwarded full.

I consider first the question of burning and lubricating

oils. The applicants import, the Scottish oil companies manufacture the oil they respectively sell. The applicants established their depot at Grangemouth in 1907, and the traffic which they send over the lines of the respondents is similar as regards these oils to that of the Scottish oil companies. For a number of years before the applicants' entry into the Scottish market foreign oils had been imported. The respondents urge that there is no differentiation against the Anglo-American Co., in particular the rates charged them being the same as those charged the other merchants whose names were given; that as between manufacturer and merchant there never has been equality of charge during the sixty years that the Scottish oil industry has been in existence; that in favour of the manufacturer the differentiation has throughout been approximately 25 per cent., and that no trader has objected. The fact, however, that there has been a difference of treatment in the past still leaves the question open whether this difference does not constitute an undue preference. The rates charged the Scottish oil companies were originally fixed by agreements commencing about the year 1865 for all mineral oil products (though there was no mention of naphtha). These agreements have now all expired, with the exception of the one which still subsists between the Broxburn Oil Co. and the North British Railway Co. Its duration is declared to be "so long as the works of the Broxburn Co. are carried on." Any agreements between oil companies and the Caledonian Railway Co. have now run out. The peculiarity of the position is that the Broxburn agreement sets the standard of charge in point of fact, not only for the Broxburn Co., but also for the other Scottish oil companies both on the North British and Caledonian systems. It is not said that the rates charged the Scottish oil companies are unremunerative, but it is apparent that the existence of the Broxburn agreement creates a difficulty in the way of either of the railway companies raising these rates.

There is no indication in these agreements themselves, and no evidence was led to show that, in fixing the rates applicable to the oil companies, any fixed percentage of difference between manufacturer and maker was in view. The reference in Young's agreement with the North British Co. in 1865 to the withdrawal of opposition to a Parliamentary Bill shows that other causes may have been at work to secure what may have been regarded as favourable terms for the oil companies.

There was an adjustment made in 1894 and the differentiation of 25 per cent. was adopted as an overhead figure. The fact that the rates are calculated in multiples of 5d. leads to some variation in the percentage, and the operation of the maximum rate for a very short journey brings out a larger figure than 25 per cent. In 1913 there was a general raising of rates by 4 per cent., but the percentage of differentiation was maintained. There has been a dispute between the respondents and the oil companies as to whether the latter are bound to pay the increased rates, in view of the Broxburn agreement, but that is not material to the present case.

The question is whether the differentiation between manufacturer and merchant is justifiable. It is not necessary, in forming an opinion on this point, to go into the question of what the charging power of the railway companies is in regard to this class of goods. Our duty is not to say what sum the respondents might charge, but to say whether the relative rates charged constitute an undue preference. No question therefore arises as to whether the respondents, in fixing the rate charged the applicants, are bound by the statutory maxima, or whether, not being common carriers of such goods, they may fix a reasonable rate, which they are not bound to disintegrate, and which is fixed without estimating what is terminal, and what is the rate for conveyance. From the point of view of the railway companies, it was argued that manufacturers and merchants are not *in pari casu*; the manufacturer, it was said, has to locate his works where he can

find the raw material, in the case of these oil companies on barren moorland, where every railway facility has specially to be provided; the merchant's place of business is in a town where railway facilities already exist; the maker has to provide his own sidings, the merchant has not. In the case of the manufacturer there is both inward and outward traffic; in the case of the merchant only outward traffic, with a trifling amount inward; the volume of the manufacturer's trade is steady, and guaranteed by the exigencies of his standing expenditure; the merchant's traffic may be intermittent. The railway companies, it was contended, may have regard to anything that makes traffic more valuable to them, and are not limited to the cost of providing haulage and accommodation. From the point of view of the public there is the employment of a number of workmen in the shale industry and in mining the coal required as well as in ancillary occupations, together with the traffic necessary in order to supply their needs. This refers only to what may be termed the producing public.

In putting forward these contentions counsel for the respondents disclaimed any intention of arguing any question of general principle. The special position of the Scottish oil companies, it was said, must be contrasted with the conditions under which the Anglo-American Co. conduct their business. It is not, according to the respondents' view, because the one man is a maker and the other a merchant that a different rate is justifiable. It is because the conditions of the business of the one differ radically from the conditions of the business of the other. In spite of their disclaimer it is difficult to see how the applicants can succeed without asking us to lay down a principle of far-reaching application. The considerations argued on behalf of the Scottish oil companies would apply in varying degree to all home producers, whether industrial or agricultural. It is sufficient, in order to decide the present case, to say that the differences in rates do work an injustice as between the applicants and the Scottish oil

companies. It is no doubt true that in certain cases it has been found fair to fix and maintain inequality of rates, in order to prevent a certain class of traders having a monopoly of the market owing to their geographical position. As has been pointed out, it is desirable in the interests of the public that as many avenues of approach as possible to the market should be kept open. This is for the benefit of the consumer. Incidentally, this may be also for the benefit of a section of the public who produce, and who, in consequence of the lower rate, are entitled to get their goods to market on equal terms with their competitors. Such considerations are entirely absent here. The difference in treatment is not necessary, to use the language of section 27 of the Railway and Canal Traffic Act, 1888, for the purpose of securing in the interests of the public the traffic in respect of which it is made. Nor is it capable of being justified on the ground of the volume of trade. In using this argument the respondents contrast the traffic of the Anglo-American Co. with the traffics of the whole of the oil companies put together.

The same or similar services are rendered to the applicants and the oil companies. No doubt is cast upon this in the pleadings, where all that is said is that for the purposes of comparison cartage must be excluded. The terms of the agreement between the Caledonian Railway Co. and the Anglo-American Co. do not support the respondents' contention that the services are different. They found on Article 7; the effect of that however is merely this, that as they are paying rent for their siding, they would be entitled to a rebate, as station accommodation is not being provided by the railway company, unless this claim were excluded. Article 7 does not exclude it.

As regards burning and lubricating oils, it is admitted that the Anglo-American and the Scottish companies are in competition. I am of opinion that the applicants have established their case of undue preference.

As regards naphtha and motor spirit the circumstances of

the case are somewhat different. The real dispute is in regard to motor spirit, a recent industry. The railway companies admit that when the naphtha rates were fixed motor spirit was not in any one's mind. They say that there is no material competition in motor spirit between the applicants and the oil companies. There was controversy before us about naphtha, the railway companies saying that nothing had been consigned under the head of naphtha, the applicants' salesman saying that naphtha had been sent under the description of deodorised spirit. He deponed that certain specified contracts for naphtha had been lost in cases where his company had competed with the Scottish oil companies. I think competition in naphtha is proved. The way in which motor spirit stands is this:—The Anglo-American Co. sells three classes, known as Pratt's Nos. 1, 2, and 3; the Scottish oil companies do not sell anything so good as Class 1, but they do sell motor spirit which is as good as Class 3. It is doubtful if it is as good as Class 2. In the rate charged by the railway companies for motor spirit no distinction is made in regard to classes 1, 2, and 3. Instances were given by the applicants' salesman of contracts for motor spirit which his company had lost, where the competitors were the Broxburn and the Pumpherston Oil Companies. The article tendered for was in each case the same, the lowest grade of motor spirit. We are asked to say that there is competition between the applicants' Nos. 1 and 2 classes and the motor spirit sold by the oil companies. I do not think we can do so. It is said that for several months the Oakbank Co. has been producing a better class motor spirit, but without taking that into account I think that competition in motor spirit is proved. The article sold by both the applicants and the oil companies is the same, and for the same purpose. The case is different from one in which the articles are different, though the one can be used by adaptation as a makeshift for the same purpose as the other; and also different from the case of ultimate competition between a manufactured article

which has never been carried by the railway company and another article which they have carried. There is, therefore, undue preference as regards naphtha and motor spirit. It is unnecessary to deal separately with returned empties. The applicants are entitled to similar treatment with the oil companies.

The position of both railway companies is the same. Though the Caledonian is not bound by any subsisting agreement, as is the North British in the case of the Broxburn Co., the rates charged by each are *de facto* the same. Mr. Macmillan, for the North British Co., maintained that in the event of our taking a view adverse to his clients, the existence of this agreement might be relevant as showing that the railway company could not level the rate up, so as to redress the inequality, and that they could only abate the undue preference by levelling down. No evidence has, however, been laid before us that the rates charged the applicants cannot be lowered to the same level as in the case of the oil companies without unduly reducing these within the meaning of section 27 (2) of the Railway and Canal Traffic Act, 1888.

There should, therefore, in my opinion, be an order that the rates complained of constitute an undue preference, and that the respondents should abate them.

HON. A. E. GATHORNE-HARDY: The applicants carry on a large business in the sale and distribution of petroleum, benzine, oil, and motor spirit, both in England and Scotland, and own a storage and distribution depot in the latter country from which they send large quantities of their products over the defendants' railways. In 1913 they paid £14,948 in rates to the Caledonian Co. and £4,106 to the North British Co. in respect of this traffic. The rates under which their goods are carried were fixed by agreement in May 1907. Similar traffic is carried for certain Scottish oil companies, such as the Broxburn Oil Co., the Oakbank Oil Co., and others, which have been established about half a century, at

rates substantially lower than those charged to the applicants, and empties when returned are also charged at lower rates. The charge for empties need not again be referred to, as it must admittedly follow our decision on the main question. The rates charged to the applicants for the carriage of lubricating oils is 25 per cent. in excess of that charged to the oil companies, while for naphtha and motor spirit the differentiation amounts to 150 per cent. That this difference amounts to a preference cannot be disputed, and under section 27 of the Traffic Act of 1888 the burden of proving that this preference is not undue is cast upon the defendants.

They seek to justify this difference in three ways, with which I shall deal in order.

1. The different circumstances under which the parties trade.
2. A charge for services rendered to the applicants equal to the difference.
3. The absence of competition.

The first justification of the defendants is substantially based on the distinction between merchant and manufacturer, and is set out in paragraph 10 of the Answer of the Caledonian Co. and paragraph 11 of that of the North British Railway Co. It appears that the rates charged to the oil companies were fixed by agreements made as early as 1866, of which one at least, that with the Broxburn Oil Co., is still subsisting. These rates were granted to manufacturers only, and we have it in evidence that the difference between merchant and manufacturer has been maintained from the first, and that the rate charged to the applicants is the ordinary merchants' rate. It was contended that the low rate was necessary to establish the industry "in the interest of the public" and that, as is undoubtedly the case, a manufacturer's business necessitates inward as well as outward traffic to the advantage of the carrying company. But if this argument were allowed to prevail it would justify that very preference for home-produced over imported goods which

is expressly forbidden in the section. The leading factor we ought to bear in mind in arriving at a decision is the interest of the consuming public.

Mr. Clyde in his able argument disclaimed this distinction. He said "I can imagine nothing more fatuous than to say there is a distinction in principle between the man who makes and the man who trades," but this was the distinction really made by his witnesses, and urged by them as the justification and origin of the difference. "The differentiation," says Mr. Matheson, the manager of the Caledonian Co., "was between two broad classes, the manufacturing class of trader and the merchant class of trader, and was not confined to the oil trade," and he repeats this in several parts of his evidence which was adopted and confirmed by Mr. Jackson, the manager of the North British Co. Mr. Clyde urged the circumstances of the traffic, its volume and regularity, but he failed to convince me of any real distinction between the traffic of the applicants and that of any one oil company, except in respect of inward traffic with which I have already dealt.

The second ground of justification was only put forward at the last moment, and was not in my opinion very strenuously urged. This was an attempt to establish a charge for services rendered to the applicants and for a station terminal, and so raising the cost to the amount of the difference. Had there been any force in this argument I am of opinion that it should have been specifically pleaded and full particulars given. I am, however, convinced that neither the claim for services nor that for a station terminal has any foundation in substance. The rate charged to the applicants was intended to cover all services from the siding to the point of destination; it was founded on, and is the same as that charged to all "merchant traders," and is the same as the station rate, which disposes of the attempt to claim a station terminal. The seventh article of the agreement with the applicants, from which it was attempted to

deduce that the siding at their depot, constructed on land leased to them, for which they pay rent, was a station of the defendants for which a terminal could be charged, can bear no such meaning, and was in my opinion only intended to preclude the possibility of a claim for siding rebate in respect of the identity of the station and siding rate.

The third and last head of justification was the absence of competition. With regard to the higher classes of mineral oils competition was admitted, but it was strongly urged that the oil companies did not compete with the higher classes of motor spirit supplied by the applicants. I am, however, of opinion that we cannot draw so fine a distinction between articles all available to drive motors, and that an inferior and lower-priced article can and does displace the higher. We also had evidence which satisfied me that there was competition in fact. For these reasons I am satisfied that the defendants have failed to justify the preference, and that the order must go.

SIR JAMES WOODHOUSE: This is an application by the Anglo-American Oil Co. to restrain the Caledonian Railway Co. and the North British Railway Co. from giving an undue preference in respect of railway rates to certain Scottish oil companies and other rival traders in Scotland.

The applicants carry on an extensive business in England and Scotland in the sale and distribution of petroleum, refined and lubricating oils, benzine and motor spirit. In Scotland their principal depot is at Grangemouth Dock, a little over a mile to the east of Grangemouth goods station, on the site of two plots of land containing about $3\frac{1}{2}$ acres which they have since 1907 leased from the Caledonian Railway Co. These sites are opposite each other, but separated by the dock railway lines. At the depot is a railway siding which is connected with the dock railway line of the Caledonian Co., and this line connects with the main

running line of the Caledonian Co. near Grangemouth station. To the west of Grangemouth station are marshalling sidings of the Caledonian Co. and of the North British Co. side by side and coloured respectively blue and red on the plan exhibited. The North British Co. by virtue of their running powers have access over the Caledonian lines to the applicants' depot, but the North British traffic between the depot and their marshalling sidings is worked entirely by the Caledonian Co.

The applicants import their petroleum oil and motor spirit by steamer to their depot at Grangemouth Dock, whence it is discharged by pipes into storage tanks on the applicants' premises, and then put into barrels or tins for the purposes of sale and distribution. These are loaded by the applicants on the siding into wagons which are hauled by the railway company's dock engine over the dock lines into the marshalling sidings (known as Foul Dubs Sidings), and thence transported to stations and places upon or beyond the systems of both railway companies.

Petroleum oil has been produced by numerous companies in Scotland for more than half a century, and the applicants complain that whilst the finished and unfinished products of these companies are similar to those of the applicants, and have had similar railway services rendered in respect of them, the respondents have for some time past carried the traffic of these oil companies over like distances at much lower rates than are charged to the applicants. Some of these oil companies have their works upon the system of the Caledonian Co., and some upon that of the North British Co. Until quite recently traffic agreements have existed between all these Scottish oil companies and one or other of the railway companies, under which the services to be rendered and the rates to be paid were prescribed. As typical of those on the Caledonian system the agreement of the Oakbank Oil Co. made in 1877 was exhibited before us; and we had also in evidence a similar agreement by the North British Co. with

the Broxburn Oil Co. made in 1886, which is still in existence and is only determinable during the existence of the oil company by consent. As examples of the differential rates complained of, the applicants proved, and the respondents admitted, that (eliminating all charges for cartage) the following, out of many other instances, were the rates charged for the conveyance of oil and motor spirit at owner's risk.

(1) *For refined and lubricating oils.*

	Miles.	Scottish Oil Cos. s. d.	Applicants. s. d.
Grangemouth to Edinburgh	...	27	3 10½ 5 0
,, ,, Lanark	...	41	5 7 6 8
,, ,, Perth	...	44	5 10 7 1
,, ,, Peebles	...	55	6 9 8 4

(2) *For naphtha and motor spirit between the same places.*

		Scottish Oil Cos. s. d.	Applicants. s. d.
Grangemouth and Edinburgh	3 10½ 10 1
,, ,, Lanark	5 7 13 10
,, ,, Perth	5 10 13 0
,, ,, Peebles	6 9 18 0

In all these illustrations the rates are taken as they existed prior to July 1, 1913, from which date the railway companies gave notice of a general raising of their rates all round by about four per cent. These increased rates have not, however, been paid, and the Scottish oil companies refuse to pay them. They apparently rely on the Broxburn agreement, which fixed special rates in perpetuity as an answer to the respondents' proposals in this direction. That the foregoing rates show, when the latest increase is added with regard to refined oils, a difference varying from 18 to 27 per cent., and in the case of motor spirit a difference of 123 to 169 per cent., in favour of the Scottish traders against the applicants is apparent, and the onus is therefore upon the respondents to justify the unequal treatment of which the applicants complain.

Before dealing with the grounds of the respondents' justifi-

cation it may be observed that the applicants are not unimportant Scottish traders. Apart from the rent they pay for the land they occupy, they have erected thereon a depot costing over £14,000, and they pay to the respondents in the aggregate a sum yearly of about £20,000 in railway rates, with a traffic tonnage in the year 1913 of about 30,000 tons, carried in the proportion of about three-fourths over the Caledonian Co. and one-fourth over the North British Co. This is in respect of traffic from Grangemouth, but they also import some additional traffic in lubricating oil at Glasgow and transport it from there to other places. The total outward traffic of the products of the Scottish oil companies for the year 1913 was over 400,000 tons, and the revenue therefrom about £110,000, but a large proportion of this traffic consisted of sulphate of ammonia and other goods not carried for the applicants. In the case of these Scottish companies, the bulk of which are on the North British system, there is also a very considerable inward traffic consisting largely of coal and dross and crude oil for refining, caustic soda, bricks and other sundries.

Whether a difference of treatment amounts to a preference, and whether that preference is undue or unreasonable within the meaning of the Traffic Acts, is entirely a question of fact to be determined by the Court after a full consideration of all the relevant circumstances. The main ground of justification by the respondents for the differential rates complained of was that the character of the respective traffics and the conditions and circumstances under which they were carried were materially different from those of the applicants and that these different circumstances not only made the lower rates charged to the Scottish oil companies quite reasonable and commercially fair, but did not unduly prejudice the applicants.

In this case it was said that from the inception of the Scottish oil trade, and before the advent of the applicants, there had in practice always existed a difference between the

rates charged to the oil companies as manufacturers or producers and the rates charged to merchants who were not producers for the conveyance of mineral oil traffic, because the traffic of the former was more certain and valuable than that of the latter, and no complaint had hitherto been made. This difference, it was said, had been fixed by the traffic managers at about 25 per cent.; but although that may in the aggregate about represent the ratio of the present difference on the carriage of refined oils, and although the rates to different places from the points of origin where works existed have no doubt varied in different degrees and ratios at different periods, I do not think it is borne out by the evidence that there has ever been in practice any fixed principle or differentiation, or that that was the real origin of any distinction between them such as is now set up by the respondents' managers.

I think on closely examining the agreements between the Scottish oil companies and the respective respondents, that it is obvious that the special rates were given to these companies in consideration of and solely to secure the thirling of the competitive traffic to the particular carrying company with which the agreement was made, and that but for the competition between the respondents which at that time existed, it is more than probable that neither these agreements nor the special rates would have come into existence.

The object, it is said, has been to assist the establishment of new industries, to protect or develop them when established, to promote improvement, and it is part of the case of the respondents that they could afford to carry the outward traffic of these oil companies at lower rates because they got a substantial traffic inward which brought them considerable revenue, and that they got no such return from the purely importing companies or ordinary merchants. It was contended that these were considerations which we were entitled to regard as in the public interest within the meaning of section 27 of the Railway and Canal Traffic Act of 1888.

This argument does not impress me. I think that it would be prejudicial to the public interest as well as to the traders to accept it. Although the differential rates may be now only 25 per cent. lower in favour of the Scottish oil companies in the traffic in refined oils which is admittedly competitive, there is a difference of 150 per cent., in the aggregate rates in the traffic in naphtha and motor spirit, which it is said by the respondents is only partly and slightly competitive, but which we think is really and substantially competitive; and an admitted difference of 75 per cent. in the returned empties. To allow these differences over similar distances where no real difference has been shown in the nature or cost of service for the avowed purpose of supporting and maintaining particular local industries would be (to use the language of Mr. Justice Wills in *Liverpool Corn Traders' Association v. Great Western Railway Co.*¹⁾ "to establish a kind of local protection by which the natural competition of trade would be stifled and the interests of the consumer subordinated to those of the manufacturer or the merchant."

Another point taken by the respondents' counsel (but not raised upon the pleadings) was that the traffic of the Scottish oil companies was carried at less cost to the railway companies than the applicants' traffic. A comparison was made of the services rendered in respect of each traffic, and the contention put forward was that in the case of the oil companies they provided at their works all the accommodation and did all the services, whilst in the case of the applicants all the accommodation was provided and the services were performed by the railway company. I think that this point, which should have been specifically raised by the pleadings, is obviously an afterthought, and becomes when the facts are examined wholly untenable. For the purposes of comparison I take the Oakbank Oil Co. Its works are upon the Caledonian Railway, and are connected with the running line by

a private siding. Although the rates charged to the Oakbank Oil Co. are called private siding rates, and include no charge for station accommodation—because none is provided—and no charge for the service of loading—because by the express terms of their contract this has to be done by the oil company—yet they are shown in the rate book as station to station rates, and, in fact, according to Mr. Matheson's evidence, there is no difference between the charge from these works, where this accommodation is not provided and the terminal service is not rendered, and that from Mid-Calder Junction, which is the nearest station, about a mile distant, where station accommodation and services are provided. Similarly, in the case of the Anglo-American Co., although their depot has a siding, and they perform their own service of loading, they are charged what according to the rate book is a full station to station rate, and precisely the same rate as is charged from Grangemouth station.

By their agreement with the Caledonian Co. it is provided in clause 7 that the applicants shall not be entitled to any rebate or reduction from rates and charges in respect of their siding. Mr. Clyde argued that the effect of this clause was to make the siding a railway siding as distinct from a private siding, and to convert it into a terminal station with all the incidents of a terminal station as regards powers of charging for accommodation and services; but I think that the true effect and intention of clause 7 is this—that whilst the Caledonian Co. were imposing the same station rate on the applicants which they charged from Grangemouth station, it was precluding the applicants from any claim to rebate to which they might be entitled in view of the fact that they did not receive the whole of the station accommodation and services which the rate presumably included. I fail altogether to appreciate the attempted distinction that the applicants' siding was a railway siding and not a private siding. The Caledonian Co. constructed the siding, but it was part of the consideration for which the applicants paid £175 a year rent

and taxes. In the case of the oil company, the railway engine hauled the wagons from the point of junction with the siding to the marshalling sidings; the like service was performed by the railway company in the applicants' case and the distance was similar. When, therefore, the true nature and cost of the services rendered are compared, it is clear that they are practically identical in each case.

One other point remains to be dealt with, and that is the question of competition. No question was raised as to there being active competition in the traffic of refined and lubricating oils, but it was strongly contended that no competition was established in the case of motor spirit. It appears that the applicants manufacture three kinds or grades of motor spirit, known as Pratt's No. 1, No. 2, and No. 3. Nos. 1 and 2 are well-known qualities of motor spirit used for motor traction, but No. 3, it is said, is a coarser spirit and the only one which in any way comes, according to the respondents' view, in competition with that manufactured by any of the Scottish oil companies. On the other hand, the sales manager to the applicants gave evidence of numerous instances where they had found themselves in competition with the Scottish oil companies, and where owing to a small difference in price they had lost the contract. That the Scottish oil companies manufacture and sell a motor spirit which is in commercial use for traction purposes, and is sufficiently alike in kind to be a competitive article with that of the applicants, is in my judgment sufficient to satisfy the requirement for equal treatment. It is commercially and substantially a competitor, and a difference in grade or quality becomes in such circumstances immaterial.

I am, therefore, of opinion that the respondents have failed to justify the unequal rates complained of, that the applicants have been unduly prejudiced thereby, and that they are entitled to an order against each of the respondents to desist from giving any undue preference to other traders or persons in the carriage of the aforesaid traffic, and enjoining the

respondents not to subject the applicants to any undue prejudice in respect thereof.

The operative part of the order of the Court was as follows: "The Court having heard evidence and counsel thereon and on the application, answers and replies respectively for the parties, Find that the unequal tolls, rates, and charges complained of by the applicants constitute and are a preference in respect of the carriage of similar merchandise to traders other than the applicants, and that the respondents have failed to justify the same: Find that the unequal tolls, rates, and charges complained of constitute and are an undue preference and that the applicants are unduly prejudiced thereby: Therefore require, ordain, and decern the respondents the Caledonian Railway Co. and the North British Railway Co. to desist from giving the said undue preference in respect of tolls, rates, and charges for conveyance of and services in respect of merchandise similar to that of the applicants."

The question as to whether the applicants were entitled to recover damages subsequently arose for decision by the Court.

It was admitted that the complaint of undue preference had not been made to the Court within one year from its discovery by the applicants as required by section 12 of the Railway and Canal Traffic Act, 1888, but it was claimed that the proviso as to the time limit in section 12 did not apply to cases of undue preference and that the conditions contained in section 13 of the Act of 1888 alone applied to that class of case.

LORD MACKENZIE: We are all agreed that in fixing the basis upon which damages can be awarded, regard must be had both to the provisions of section 12 and of section 13. The claim for damages accordingly fails.

It was further contended on behalf of the applicants that the interlocutor or order of the Court should take effect as

from January 13, 1915, the date of the application, and not from June 25, 1915, the date of the order. Reference was made to *Gilstrop v. Midland and Great Northern Railway Cos.*,¹ where Wright, J., held that a private siding rebate given under section 4 of the Traffic Act, 1894, *prima facie* ought to begin at the date of the application.

For the railway companies it was contended that the applicants could not recover the excess paid since the date of the application by way of damages, and that a retrospective interdict was impossible.

LORD MACKENZIE: We are of opinion that the claim which is now put forward is of the same nature as the claim for damages which we have already disallowed, and accordingly it must follow the result.

Solicitors--Drummond & Reid, for the applicants; D. L. Forgan, for the Caledonian Railway Co.; James Watson, for the North British Railway Co.

HOLBROOKS, LIM. *v.* LONDON AND NORTH WESTERN RAILWAY CO.¹

Increase of Rates—Computed Weight—Undertaking to Pay—Power of Railway Company to alter Scale—Railway and Canal Traffic Act, 1888, s. 33, sub-s. 6—Railway and Canal Traffic Act, 1894, s. 1.

March 15, 16, 1916.—The applicants, a firm of vinegar manufacturers, had for many years been in the habit of consigning casks of vinegar over the defendants' railway. Disputes arose as to the defendants' charges for carriage, and on March 21, 1892, the applicants entered into a written undertaking that for the future they would pay the defendants "for carriage by railway on their behalf of casks containing vinegar on the actual weight of such casks or in accordance with a scale of computed weights not exceeding actual weights to be fixed by the railway company."

In June, 1892, the defendants put into force a scale of computed weights, and the applicants paid their charges in accordance with it. In 1912 the defendants introduced a new scale under which their charges were increased, and the applicants refused to pay the increased amounts, contending that by the undertaking of March, 1892, they were only bound to pay in accordance with a scale to be fixed by the defendants once for all.

Held, that upon the true construction of the undertaking of March, 1892, the defendants were not bound for all time to adhere to the scale of charges fixed in 1892, but were entitled to change the scale from time to time, if it should be necessary to do so in order to make the charges correspond with the true weights of the casks, and that in any case no increase of rate had been made, inasmuch as the railway company had only found and adopted a more accurate method of ascertaining the actual weights.

The applicants in this case complained under section 1 of the Railway and Canal Traffic Act, 1894, that certain rates charged by the defendants for the carriage of goods had been illegally increased. The applicants were vinegar brewers carrying on business at Birmingham and elsewhere, and they were in the habit of sending vinegar in casks over the defendants' railway. For many years prior to 1886 the defendants

(1) Before Lush, J., and Commissioners the Hon. A. E. Gathorne-Hardy and Sir James Woodhouse, sitting at the Royal Courts of Justice, London.

in fixing their charges for carriage of the casks had accepted the weights inserted by the applicants in their consignment notes, but in 1886 they began to suspect that the weights inserted by the applicants were too low, and they therefore had the actual weights of a number of casks taken. As a result, they subsequently sought to enforce charges on a higher computed scale. The applicants refused to pay the higher charges, and from time to time in settling their accounts with the defendants they made deductions from the amounts claimed. In 1890 the defendants brought an action in the Queen's Bench Division to recover the sums deducted, amounting to about £480, which was settled on the payment by the applicants of £300, to include costs. The solicitors of the applicants then wrote a letter to the solicitor of the defendants in the following terms:

“ March 21, 1892.

“ Dear Sir,—The Birmingham Vinegar Company, Ld.” (by which name the applicants were then known) “ undertake that for the future they will pay the London and North Western Railway Company for the carriage by railway on their behalf of casks containing vinegar on the actual weight of such casks or in accordance with a scale of computed weights not exceeding actual weights to be fixed by the Railway Company, provided of course that in no case shall our clients be charged higher rates by the Railway Company than Railway Companies can or do charge other vinegar manufacturers in the midland district.”

Matters then remained on this footing for the next twenty years, charges being based on a scale of weights settled by the defendants on June 9, 1892.

In 1911, in consequence of complaints by competing manufacturers that the applicants were being unduly preferred, the defendants again tested the weights of the applicants' casks. The test showed, they alleged, that their charges to the applicants were unduly low, and on February 29, 1912,

they wrote to the applicants that a new and increased scale of charges would be put into force as from the following day, March 1. Under this new scale the charges were raised, and the applicants refused to pay the amounts in excess of the old scale, and deducted from their payments sums representing the increase. On March 31, 1913, the defendants refused to carry the applicants' traffic at all if they persisted in making such deductions, and thereafter the applicants paid the claims in full under protest, and in February, 1915, they took these proceedings to prevent a continuance of the increased charges and to recover sums already paid in respect of them.

In their application the applicants contended that the change of scale was in fact an increase of rate, and that as the defendants had not given notice of it as required by subsection 6 of section 33 of the Railway and Canal Traffic Act, 1888, it was illegal. They also contended that the change in scale was both a breach of the agreement arrived at in March, 1892, and was unreasonable in the circumstances. They therefore applied under section 1 of the Railway and Canal Traffic Act, 1894, for (i) an order declaring that the increased rates complained of were illegal and enjoining the defendants to desist from charging the same; (ii) an order declaring that the said increased rates were unreasonable and enjoining the defendants to desist from charging the same; (iii) an order directing the defendants to allow to the applicants the sums deducted by them from the defendants' accounts; and (iv) an order directing the defendants to pay to the applicants a sum of £425 in respect of the increased charges paid under protest since March, 1913.

In their answer the defendants pleaded that they had not made any increase of rate within the meaning of section 1 of the Railway and Canal Traffic Act of 1894; that they had always intended to charge according to the actual average weight of the traffic, and that if the old scale did not represent the actual average weight they had used it inadvertently; that in 1911 they discovered that the old scale no longer

represented the actual average weight of the traffic and that they had therefore introduced the new scale in 1912; and that if in fact the new scale involved an increase of rate such increase was reasonable and was necessary in order to avoid giving to the applicants' traffic an undue preference over the traffic of another firm of vinegar brewers.

The defendants also counterclaimed for the sums deducted by the applicants from their accounts.

Evidence was given that throughout the material period there had been no variation in the applicants' casks.

R. Whitehead, K.C., Holman Gregory, K.C., and E. Clements, for the applicants:

The computed scale of June 9, 1892, was fixed once for all as part of the consideration for terminating the litigation between the parties. The defendants' minute of the arrangement says: "it was decided for the future to adopt the following system of obtaining the weights of this traffic"; and there was no provision in the agreement that the scale should be subject to revision from time to time. And even if the applicants' construction of the agreement is wrong, and the defendants have power under it to revise the scale from time to time such revision must only take place on reasonable notice, and here no reasonable notice was given. It cannot have been intended that when the litigation had been terminated by a formal agreement either party could repudiate the agreement at a moment's notice.

The fact that for twenty years payments were based without question on the old scale shows that it was regarded as permanent; and the fact that the new scale involves the applicants in increased payments shows that there has been an indirect increase of rates within section 1 of the Railway and Canal Traffic Act of 1894. In *Joseph Watson & Sons v. Midland Railway*,¹ it was clear that the parties intended

that there should be tests made from time to time and that a change could always be made in the computation; in this case the intention was that the computation should be permanent, it was a matter of definite bargain once for all. The defendants are now seeking to charge on an average computation, which must lead to a charge which in some cases is in excess of the actual weight, and such a charge must be illegal.

Sir J. Simon, K.C., G. J. Talbot, K.C., and Bruce Thomas, for the defendants:

There has not been any increase of rate; all that the defendants have done is to ascertain more accurately what they are carrying. The defendants in dealing with this traffic have never intended to carry it at any charge but that for the actual weight, and the change in scale has merely been an attempt to arrive at the true weights. If the intention had been that the scale fixed in 1892 should never be subject to variation the parties would have definitely said so. The question of the right of the defendants to base their charges on an average does not arise on the pleadings and cannot be decided in this case.

LUSH, J.: This is an application under section 1 of the Railway and Canal Traffic Act, 1894. By their application Messrs. Holbrooks, Lim., complain that a certain alteration that has been made by the railway company in the scale of charges for the carriage of casks of vinegar is illegal, and is also unreasonable. The applicants, to state their case shortly, say this: that prior to March, 1912, the company had adopted a certain scale of rates or charges for the carriage of the applicants' casks of vinegar and also for the carriage of the empties, and that they have illegally altered that scale and put in force a new scale which, in the first place, is not justified because the necessary notice of it has not been given, and, in the second place, is unreasonable because there has been no change in the circumstances justifying the alleged increase. The applicants relied, and I thought until Mr.

Whitehead said to the contrary, relied mainly if not exclusively, upon an agreement which they say was entered into between the parties in March, 1892. But I understand Mr. Whitehead to say that the application was intended also to raise this case, that apart altogether from the agreement there has been an increase in the rates or charges, which increase is both illegal and unreasonable. Therefore I treat the case as raising those two contentions.

Now the circumstances under which the application is made are shortly these. The applicants carry on a very large business at Birmingham and at other places as vinegar brewers, and they have been in the habit for a very long period of time of consigning their casks of vinegar over this railway. The casks, until 1892 or the beginning of 1893, were of these weights: some of them were $12\frac{1}{2}$ gallons, some were 18 gallons, and some were 25 gallons; and there were also, and still are, larger casks even than the 25 gallons. I will deal with the full casks first, and with the empties afterwards. Before 1886 the applicants, following the usual course, had been in the habit of inserting in their consignment notes the weight of the casks that were being consigned, and instead of having each cask weighed, which would have been a very cumbersome and burdensome proceeding, they inserted in the consignment note a weight which was really an average weight taken as the result of either computation or actual weighings of a number of these casks. One cask would be of one weight, a cask of a higher description would be of another weight, and so on; the railway company adopted these weights and matters went smoothly until 1886. In 1886 the railway company had reason to suspect that the weights, which the applicants were inserting in their consignment notes, were inaccurate and were too low, and that they did not even represent the average of the actual weight of the casks. The company consequently began to have actual weights taken, and they ascertained, as they considered, that their view was right, and that the weights, upon which the appli-

cants had been in the habit of paying, were not correctly ascertained, even on the basis of taking an average by the weights which had been put into the consignment notes by the applicants.

The consequence was that some time between 1886 and 1890 the company sought to enforce a charge upon a higher computed scale of weights than that which the applicants had been inserting and contending was right. The applicants refused to pay. They made deductions from the payments which they made in respect of the carriage of these casks, and in 1890 the company commenced an action in the Queen's Bench Division against the applicants for payment of these deductions, and their total claim was, in round figures, about £480 for deductions down to a certain date. The applicants put in a defence consisting really exclusively of traverses of the statements made by the company in their claim. Interrogatories were administered and answered and particulars were given, and the case was ripe for coming on at the Birmingham Assizes in 1892. But the action was settled. It was settled on these terms: the applicants, the then defendants, agreed to pay and did pay a round sum of £300 to include costs in satisfaction of the cause of action. In addition to that payment they entered into a written undertaking, which was dated March 21, 1892; this is the document upon which the applicants rely in paragraph 5 of the application and which, they contend, is an agreement in support of their case. For the moment I will not pause to construe or say what I think is the true meaning of that undertaking. It is sufficient to say that it was an undertaking by the applicants, that for the future they would pay to the company for the carriage by railway of their casks containing vinegar on the actual weight of such casks or in accordance with a scale of computed weights, not exceeding actual weights, to be fixed by the company. Then there is a proviso to the effect that the applicants should not be charged higher rates than other vinegar manufacturers in the midland district were being

charged from time to time by the railway companies. The applicants paid the costs. It is true that they did not pay on a taxation, nor did they pay a specific sum, but they paid the costs in this sense: they paid this round sum of £300 to include costs, and they gave the undertaking, and thereupon the litigation came to an end.

Something like nine months after the termination of that action a new cask of six gallons was put on the market by the applicants, and the new casks were conveyed by the company along with the larger casks. In 1903 differences arose between the applicants and the company with respect to empties. There was a meeting, and the matter was discussed, and when the two different scales of charges in respect of empties came to be compared, it turned out that the scale which the company said was the right one varied to a comparatively slight extent from that which the applicants said was the right one. The differences were adjusted, and from that time payments were made upon the scale contended for by the applicants.

So matters went on until 1909. In that year a firm carrying on business near Manchester, Messrs. Robinson, who then had themselves a difference with the railway company, raised the contention that Holbrooks, Lim. were being charged really less than they Messrs. Robinson for the carriage of similar casks, because the scale upon which Holbrooks were being charged was said by Messrs. Robinson not to represent the actual weight of the casks. Thereupon the matter was looked into again, and the company had fresh weights taken on a very large scale of these casks of vinegar. We have had in evidence a document containing the weights, taken not only at Birmingham but at various places, of the casks of these different sizes which belonged to the applicants, and which the company had been carrying. It is admitted that those weights are correct; and when one compares them with the weights in the scale of charges worked upon until 1912, it is evident that the weights upon which the applicants had

been charged did not accurately represent the true weights of the casks, that they were less than the real weights, and less than a fair and proper average. There is no question about that as a matter of fact; it is apparent on the face of the documents. Thereupon the company came to the conclusion that they ought to alter and adjust the scale of weights in order to bring them into harmony with the real weights. Of course it is impossible, unless the actual weight of each cask is taken, to do more than bring them into harmony with the real weights, looking at the matter fairly and from a business point of view. The company consequently at the end of February gave notice that they would charge upon a new scale of weights, and on March 1, 1912, they sought to enforce this new scale. The applicants objected. They made deductions and would not pay; and thereupon the defendants refused to carry their casks unless the applicants would pay on this scale. Then the applicants took these proceedings, and it is in these circumstances that the matter comes before us.

Now there are, as I have said, two questions that are raised. One question is whether upon the true interpretation of this undertaking or agreement of March, 1892, the company have acted beyond their powers in altering the scale, as they have altered it, in March, 1912. The second question is whether, apart altogether from this undertaking or agreement, the company have in fact increased their rate, because if they have increased their rate then the question would arise, first, whether they have published the necessary notices, and, secondly, whether they have discharged the burden, which undoubtedly in that case would be on them, of showing that the increase was reasonable.

I will deal with the case in the order in which I have stated these two questions. First, therefore, one has to consider the true meaning and interpretation of the undertaking given on March 21, 1892. I think that the undertaking is a perfectly plain one and presents no difficulty in its construc-

tion. It is quite true that the expression "casks containing vinegar" does not specify the weight of the casks, and it is quite true that at the time when that undertaking was given there was no six gallon cask of vinegar being carried for the applicants by the company. In my opinion that is wholly immaterial. The language of this undertaking and the terms in which it is framed are so wide as, I think, obviously to have been intended to include any casks containing vinegar which at any future time the applicants might require the defendants to carry. They might give up one of their existing casks, they might add to the sizes of their casks, as in fact they did, and therefore I think it is impossible to contend otherwise than that this undertaking—for it is really that, and not an agreement—is so drawn as to make it clear that any casks containing vinegar from time to time should be within the scope and purview of the undertaking. That being so, the undertaking is that for the future, the applicants will pay for the carriage of all the casks containing vinegar on the actual weights or in accordance with the scale of computed weights, not exceeding actual weights, to be fixed by the company. I will not trouble about the proviso, because no question arises in this case as to the applicants being charged higher rates than other manufacturers are charged by other railway companies. The undertaking is perfectly plain in its terms. It gives to the company the option at any time from time to time in the future, if the company think fit, to take the actual weight of each cask, or, to ascertain the actual weights by average or computed weights; and it gives them the right to ascertain the actual weights by a fresh scale of computed weights, if they find that there has been an error in the method of getting at the actual weights in the past, subject only to this, that they are not to publish or enforce or act upon computed weights which are in excess of actual weights. The company have the option of doing either the one or the other. The language of the undertaking demonstrates beyond controversy that in the

past as well as in the future, the object of bringing out a scale of computed weights was not to make a concession to the applicants of carrying a cask which weighed a certain amount at a less amount, but that the whole object of it was to get at the actual weights without the burdensome operation of weighing each cask. It would, of course, be impossible to get at the true weights, but the object of the parties was to adopt this convenient and conventional method of dealing with it by striking an average which might be, and in certain events must be, adjusted from time to time when mistakes arise. It might be that the applicants would alter the weight of their casks. They might put heavier bands round them, or whatever else was required. Therefore, this undertaking is in the widest terms, that the company were to be at liberty from time to time to frame a scale of computed weights for the purpose of arriving at the actual weights which the company were carrying for the applicants.

That being so, if that is the true view of the undertaking, as regards all the casks containing vinegar, the company were within their rights in publishing this new scale in March 1912. It is admitted that the true weights were ascertained and worked upon, and the new scale was published in order to give effect to the new weights that they had ascertained and to establish a more accurate way of arriving at the weights than that under the old scale.

That, I think, is sufficient to dispose of the contentions of the applicants as regards the full casks, but I will add this, that even apart from the undertaking in my opinion the contention of the applicants fails. They have failed to show, I think, that the company have made any increase of the rates at all in fact. What the company have done is simply to find a more accurate method of getting at the actual weights; they have not altered the rates. The parties intended from the very first to get at the actual weights; and to say that, because a more accurate method is found of getting at the actual weights, the rates have been increased is to say

that which, I think, is really contrary to the facts. There has been no increase of the rates at all, and therefore there has been no burden on the company to prove that they are reasonable, and there is nothing illegal in enforcing them in the way in which the company have done.

Just one word about the empties. It is a little singular that in the common law action, as I gather, the empties were the subject of litigation as well as the full casks. The undertaking does not mention them in terms, and I am rather surprised; but it seems to me impossible when the company are taking this undertaking from the applicants, and of course are only thinking of full casks, to suggest that the applicants ever intended, or led the company to think that they intended, that a different method of working upon the empties should be followed from that which was to be followed in the case of the full casks. It seems to me that the one necessarily follows from the other, and although they are not mentioned in terms, they are within the spirit of the undertaking. But even apart from that, I do not think that it matters if they are not, because the parties have all along adopted by consent and by the course of business this convenient method of ascertaining the weights in the case of empties, just as they have in the case of full casks, and if in fact the empties have been wrongly weighed by the average calculation adopted before, the company, apart from the undertaking, are entitled to put it right and adjust it, as they did in March 1912.

I purposely say nothing as to what the right of the company would be as to charging an average weight apart from the circumstances of this particular case. It does not arise. I should think that it is very likely that it never would arise, because one can hardly conceive that traders conveying a large number of casks or other things of this kind would be so unmindful of their own interests that they would require to have each cask weighed. A very little evidence, of course, in such a case would suffice to show that both the parties

assented to the weight being ascertained by taking a computed scale which it is understood to be based upon.

For the reasons I have mentioned, I think that the application fails, and that the railway company must have judgment on the counterclaim for payment.

HON. A. E. GATHORNE-HARDY: I agree with what the learned judge has said. I do not think that there is any evidence whatever of any agreement, such as is stated in paragraph 5 of the application, that the casks should be charged according to weights computed less than the actual weights of such traffic. I do not think that it was ever the intention of the parties to make such an agreement. On the contrary, I think that the agreement which they actually did make is as my Lord has said, and is entirely inconsistent with any such proposal.

SIR JAMES WOODHOUSE: I am of the same opinion. As the applicants may desire to review our decision, I will shortly state my reasons. The applicants complain that the company in 1912 indirectly increased their charges for carrying this traffic without giving the proper statutory notice, and that such increase is therefore illegal. They also say that the increased charges are unreasonable. The traffic is carried at class rates, and it is admitted that there has not been in fact any direct increase of any rate in the rate book. The increase complained of is said to arise by reason of the company having agreed in 1892 with the applicants to charge full casks according to a computed scale of weights, lower than the actual weight of each cask, and in 1912, without any proper notice, having put in force a different scale which indirectly increased the amount of charge payable by the applicants, so as to deprive them of some benefit which the agreement gave them or which previously accrued to them.

The basis of the agreement is a letter by the applicants' solicitors to the company's solicitor, dated March 21, 1892.

The applicants had disputed in 1890 the company's charges for carrying the traffic prior to that date. That dispute also involved the question of computed weights. The company brought an action to recover the moneys in dispute, and after negotiation the action was amicably settled. The settlement included an undertaking by the applicants' solicitors embodied in the letter which I have mentioned. The applicants thereby undertook that in future they would pay the company for the carriage of casks containing vinegar on the actual weight of such casks, or at the option of the company, in accordance with a scale of computed weights. This arrangement was subject to two conditions in favour of the applicants, first that the scale of computed weights should not exceed the actual weights, and secondly, that the applicants should in no case be charged higher rates than other vinegar manufacturers in the Midland district were charged. It is upon this document, read in connection with the antecedent circumstances, that both parties rely. One of the objects of that settlement was, obviously, to prevent, if possible, any dispute in the future as to how the charges were to be ascertained. Its clear motive and declared intention primarily was that the applicants should pay according to the actual weights. The computed scale was, in my judgment, merely an alternative means or method of convenience to the attainment of that end. It was left to the option of the railway company, if they preferred to do so, instead of requiring the actual weight of each cask to be ascertained and declared, to charge by a computed scale to be fixed by the company, provided such a scale was not in excess of the actual weight. Such a method of determining the amount of a charge was an obvious convenience for both parties, but as it was under the terms of the arrangement at the option of the company to adopt it and to charge by it, so in my judgment it was in their power to withdraw it or vary it if they should be of opinion that the circumstances required it. Such a variation could not, of course, subject

the applicants to a higher charge than could be demanded for the actual weight of each consignment. If it should so subject them in any particular case, they would have their remedy in the Common Law Courts, but the contention that a variation of the scale which, though it increased the aggregate amount of the previous charge yet left it below the charge based on the actual weight, is such an increase as is contemplated by sub-section 6 of section 33 of the Traffic Act, 1888 is, in my opinion, not well founded. I think, moreover, that the letter of March 1892 comprises casks of all capacities, those which were then in existence as well as those of six gallons which were subsequently used.

Then with regard to the empties, it is said by the applicants that though they are not mentioned in the undertaking of March 1892, they obtained the benefit of a lower computed weight and charge for them by custom and the acquiescence of the company in accepting over a long period computed weights lower than actual weights. Here again I think that, though they were not specifically mentioned in the terms of settlement, the principle applicable to the full casks impliedly covered the empties. The empties were charged on a computed scale, as they could only be so charged, by consent. That practice, so consented to, was a mutual convenience, but it was a convenience adopted as a means to an end, and that end was the ascertainment of actual weight. For these reasons I think the claim misconceived, and that the application fails and must be dismissed.

Solicitors—Neish, Howell & Haldane, for the applicants; M. C. Tait, for the defendants.

LITTLETON COLLIERIES, LIM. *v.* LONDON AND
NORTH WESTERN RAILWAY CO.¹

Special Services at or in connection with Private Siding—Sorting of Trucks—Tender of Traffic in condition reasonably fit for conveyance—Quantum of Charge—Railway Rates and Charges Orders Confirmation Acts, 1891-2—Schedule, s. 5, sub-s. 1.

May 23, 24, 26. July 24, 1916.—The applicants were the owners of collieries situated about $4\frac{1}{2}$ miles from the Stafford and Wolverhampton line of the defendants and connected therewith by a branch railway belonging to the applicants and joining the defendants' line near Penkridge, south of Stafford. At the junction sidings were constructed, partly by the applicants and partly by the defendants, in accordance with an agreement between the parties, dated September 28, 1899. At first the applicants handed the traffic to the defendants indiscriminately, but afterwards, at the request of the defendants, they so far sorted the trucks that all north going trucks were delivered together, and all south going trucks were delivered together, in which condition trip engines of the defendants hauled the north going trucks to Stafford, about six miles distant, and the south going trucks to Bushbury, about eight miles distant, at which places the trucks were sorted into route order by the defendants. For this they charged the sum of 1d. per ton in addition to the tonnage rate as for services, at or in connection with a private siding; and the applicants having objected to paying the extra charge, application was made to the Board of Trade to appoint an arbitrator, under section 6 of the Board of Trade Arbitration Act, 1874, and the Board of Trade appointed the Railway and Canal Commissioners to act as such.

Held (i), following the decision in *Birmingham Corporation v. Midland Railway*,¹ that it is the duty of a trader to tender his traffic to a railway company in a condition reasonably fit for conveyance; (ii) that whether traffic has been tendered in a condition reasonably fit for conveyance is a question of fact to be decided upon the circumstances of each particular case; (iii) that upon the particular facts of this case the trucks tendered by the applicants to the defendants were not reasonably fit for conveyance until they had been sorted into route order, and that the defendants were entitled to charge for such sorting as a service rendered at the applicants' implied request, it being immaterial

(1) Before Lush, J., and Commissioners the Hon. A. E. Gathorne-Hardy and Sir James Woodhouse, sitting at the Royal Courts of Justice, London.

whether this was done at the siding or at the nearest convenient point thereto; but (iv) that the charge of 1d. per ton made by the defendants was too high, and must be reduced to .75d. per ton.

This was an application for an order to determine certain differences which had arisen between the applicants and the defendants. The applicants had applied, under section 5 of the Schedule to the London and North Western Railway (Rates and Charges) Order Confirmation Act, 1891, to the Board of Trade for the appointment of an arbitrator under the powers conferred on the Board by the Board of Trade Arbitration Act, 1874, s. 6, and the Board had appointed the Railway and Canal Commission to act as arbitrators accordingly.

The applicants were colliery owners carrying on business at Huntington, near Stafford. Their collieries were situated about $4\frac{1}{2}$ miles from the Stafford and Wolverhampton line of the defendants, and were connected with it by a private railway belonging to the applicants and joining the defendants' line at a point about half a mile south of Penkridge station. The connection was made in 1899, and sidings were laid out at the junction, partly by the applicants and partly by the defendants, in pursuance of an agreement between the parties dated September 28, 1899. The agreement provided, *inter alia*, that "(1) the Railway Company will at their own cost lay in and will thereafter maintain with all points and crossings, signal posts and signals, and all other appliances necessary and proper for the safe working thereof. . . . the sidings coloured red on the plan hereto annexed; and the traders will at their own cost make and thereafter maintain the sidings shown by broken red lines on the said plan for the purpose of forming a connection between the sidings to be laid in by the Railway Company as aforesaid and the branch railway of the traders". . . .

"(3) The Railway Company will, when and as soon as in their judgment the traffic of the traders necessitates the con-

struction of further siding accommodation, at their own cost, construct and thereafter maintain the siding shown by blue lines on the said plan."

The sidings provided for by clause 1 of the agreement were completed in 1902, and traffic began to pass, and the railway company constructed further sidings in accordance with clause 3 in 1911.

At first the applicants delivered their outward traffic to the defendants just as it came from the pits, trucks destined for places south of the junction being mixed indiscriminately with trucks destined for places to the north; but after some time they sorted the trucks in compliance with a request by the defendants, and delivered those going south separately from those going north. They did not, however, so far sort either the northbound or the southbound trucks that all trucks going to a particular destination or all trucks going over a particular route, should be together. Special trip engines of the defendants hauled the north bound traffic to Stafford, about six miles distant, and the south bound traffic to Bushbury, about eight miles distant, at which places the trucks were sorted into route order. The applicants were charged for this service a sum of 1d. in addition to the tonnage rate, as for services rendered at or in connection with their private siding, but they contended that the defendants performed no service which was not incidental to conveyance and paid for by the conveyance rate, and disputed the said charge. They relied on the agreement of September 28, 1899; and alternatively they said that if any services were performed which were not included in the conveyance rate, the charge of 1d. in respect of them was unreasonable and excessive. The defendants, by their answer, contended that the charge was made in respect of substantial services and accommodation which were not incident to conveyance, and were rendered at the request of the applicants, and were properly charged for under section 5 of the Schedule to their Rates and Charges Order Confirmation Act, 1891. The application

dealt with other matters as well as with coal traffic, but the substantial question related to the above-mentioned service.

R. Whitehead, K.C., Holman Gregory, K.C., and Hon.

R. Coke, for the applicants:

The applicants do on their own line all the sorting and shunting which it is the duty of a trader to perform, and the defendants do not do any shunting, in respect of which they are entitled to charge as for special siding services. It may be the duty of a trader to so far sort his trucks, that those intended for an up train shall be separate from those intended for a down train, but any sorting beyond that must be done by the railway company, and is included in the conveyance rate. Conveyance includes any work for which it is reasonable to use the train engine—*Manchester, Sheffield, &c. Railway Co. v. Pidcock.*¹ A railway company cannot charge for services incidental to collection unless defective siding arrangements relieve them from the duty of collection. *North Staffordshire Railway Co. v. Salt Union.*²

Sir J. Simon, K.C., G. J. Talbot, K.C., and J. B. Aspinall, for the defendants:

The obligation on the trader is to sort his traffic for specific routes before handing it to the railway company, and if he tenders his trucks without so sorting them, he impliedly requests the railway company to do the necessary sorting at his expense. Traffic should be tendered to a railway company in a reasonably fit condition for conveyance—*Corporation of Birmingham v. Midland Railway Co.*³ The real journey here only begins at Stafford or Bushbury.

LUSH, J.: Having had an opportunity of reading the judgment about to be delivered by Sir James Woodhouse, I desire to say that I agree with it, and I only wish to add

(1) *Ante*, Vol. X. 150.

(2) *Ante*, Vol. X. at p. 168.

(3) *Ante*, Vol. XIV. 24.

this: the duty of a trader being to deliver his traffic in a condition reasonably fit for conveyance, it is obvious that the question whether he has done so is a question of fact to be determined upon the facts of the particular case. Whether it is reasonably fit or whether something remains to be done before it is reasonably fit for conveyance, must be a question of fact, or one may call it a question of degree. If it is not reasonably fit, the services which the railway company render in order to make it so are services preliminary to and not incidental to the conveyance, and are therefore not covered by the tonnage rate. I agree with the conclusion of my learned colleague that the services rendered by the defendants in this case were preliminary to the conveyance. I also agree with the view which he takes as to the amount to be charged for the defendants' services.

HON. A. E. GATHORNE-HARDY: In this case we have been appointed arbitrators by the Board of Trade to determine the amount, if any, to be paid by the applicants for services rendered to them at their sidings at their request and for their convenience. The nature of those services is so fully described in the judgment of Sir James Woodhouse, with which I agree, that I will not repeat them. The question is one of fact, and very little assistance can be derived from cases cited in the course of the argument. The only point of principle determined by the cases is that a trader is bound to tender his traffic in a condition reasonably fit for conveyance, and every case must stand upon its own facts. I agree that in the present case the defendants have established their right to make a charge. My colleagues agree that the amount should be fixed at .75d. per ton, and although I personally should have been inclined to give a rather larger figure, I concur in their conclusion.

SIR JAMES WOODHOUSE: The substantial question raised upon this application is whether the defendants have rendered

to the applicants at their request and for their convenience, services in relation to their coal traffic which are not covered by the tonnage rate, and for which they are therefore entitled to make an additional charge under section 5 of their Provisional Order. The service claimed to have been rendered is that of sorting a long train of loaded trucks at or in connection with the applicants' private sidings, into what is termed sectional or route order for conveyance to their ultimate destination. The applicants contend that this service, whether performed by the defendants on the applicants' sidings or off such sidings, even though constructively in connection with them, is a service which is comprised in the conveyance rate, and is not chargeable as an extra service.

The facts are as follows: The applicants' collieries at Huntington, in Staffordshire, are connected by their own private railway, four to five miles long, with the defendants' main line from Wolverhampton to Stafford, at a point about 42 chains south of Penkridge station. Their annual output was about 300,000 tons. The applicants' traffic is worked south of Penkridge *via* Bushbury Junction and north *via* Stafford. The traffic is dealt with on two sets of sidings, laid out and constructed under agreement between the parties. Railway sidings marked 1, 2, 3, and 4 on the plan were constructed at the expense of the defendants, parallel to and adjoining the up main line, on land owned by the applicants but granted for a nominal consideration to the defendants. Colliery private sidings marked A., B., and C. on the plan were constructed by the applicants on their own land near the point of junction with the main line. Sidings A. and B. were used for placing thereon full trucks for the north; C. was used for empty trucks. Each of these last-mentioned sidings holds about 40 trucks. The method of working the traffic was as follows: the applicants on their dead end sidings close to the works, loaded their empty trucks and weighed them there. They then by their own engine

arranged their trains in two divisions. In one division they put all the loaded trucks destined for the north *via* Stafford; in the other all those for the south *via* Bushbury. Their own engine then hauled these trucks down to the colliery sidings connecting with the main line. Trucks for the north were placed in sidings A. and B.; trucks for the south were pushed by the applicants' own engine through the gates on to the defendants' sidings 1 and 2.

The traffic thus arranged is not picked up by a passing train on the main line, nor can shunting be done upon it, as over 120 trains pass along it in a day. Before the war the traffic extended to about 160 wagons a day, but since the war it has fallen off to half that number. It is worked in each direction by a trip engine. For that destined north of Penkridge an engine comes from Stafford with empties and traffic for the south, which are put into sidings 3 and 4. This engine then backs on to the trucks standing in A. and B., hooks them on and hauls them to Stafford. As the trucks stand on A. and B. destined for Stafford, they are not arranged in any order of route, but are mixed up in a generally heterogeneous order. Thus out of 40 trucks, one-fourth of them intended for the same ultimate depot may be distributed throughout the train, intermixed at varying intervals with trucks destined for entirely different routes, of which branching out of Stafford there are some five or six. Prior to November, 1914, the defendants reassorted the train by putting together at Stafford all those intended for the same destination or travelling by the same route. These were then detached and marshalled with the different trains travelling over the particular routes to which they belonged. Since the above date, however, the defendants have reassorted the applicants' north traffic on the sidings A. and B.

Next as to traffic for the south: A trip engine comes from Bushbury Junction nearly eight miles distant, with empties for the colliery and any general goods going north. The empties are put into the colliery siding C., and the engine

proceeds on the down line to Penkridge goods station, about a mile distant. Then it returns on the up line to the railway colliery sidings, bringing with it and putting into one or other of the sidings 1, 2, 3, and 4 traffic going from Penkridge north. It also brings any general goods traffic going south. After pushing in the traffic destined for the north, it hauls out the applicants' full trucks destined for the south standing in Nos. 1 and 2, attaches them to the train, and proceeds south. There being no facility for the re-assorting in route order the trucks standing on 1 and 2, this has always been done by the defendants at Bushbury, where there are special facilities for doing it by gravitation in very much shorter time than the north traffic is assorted on sidings A. and B.

Upon this state of facts the simple issue is raised: are the defendants entitled to make an extra charge for the service of sorting the trucks? The applicants challenge the extra charge upon the ground of principle, and contend that the authorities' establish as a matter of law that all that the defendants have done is included in the charge for conveyance. A number of cases were cited before us in support of this view, but I think that the only guiding principle to be extracted from them is this, namely, that it is the duty of the freighter to tender his traffic upon his sidings in a condition reasonably fit for conveyance. (Per Lawrence, J., in *Birmingham Corporation v. Midland Railway Co.*¹). Hardly any two cases agree precisely in their facts and circumstances, and, as the Court laid down in that case, it must be a question of fact in each case whether the service rendered is incident to conveyance or is due to request, express or implied, of the freighter.

In this case then, what we have really to determine is whether the loaded trucks as left by the applicants on their sidings, are tendered to the railway company in a condition

reasonably fit for conveyance. The conveyance is assumed to commence when the defendants attach their engine to the trucks in this condition, but if the trucks are not reasonably fit for such conveyance by reason of their being what I called in the Birmingham case, in higgledy-piggledy order, then the defendants are impliedly requested to do what is reasonably necessary to put them in such proper condition, and are entitled to a reasonable extra charge for the services thereby rendered necessary. Whether they do this on the colliery siding or at their nearest convenient point to the siding, seems to me immaterial. It is equally a service which the applicants have left undone at their sidings, which they ought to have done, and which the defendants do at their nearest convenient point in connection with such sidings. Upon the facts, the question whether the traffic was in this case tendered in reasonable condition, is really a question of degree. The applicants first contested, but afterwards admitted, that they were bound to at least arrange their train loads into two portions, one to go north and the other to go south, but here they say their obligation ends. But when the facts are closely examined, how do they stand? An exhibit was put in showing the condition in which the applicants handed the trucks to the defendants for a week in June, 1914. This gave twenty-one examples of trains left standing in the sidings, fourteen destined for the north *via* Stafford, and seven for the south *via* Bushbury. The former had several trucks which would have to travel by six different routes diverging from Stafford, the latter four diverging from Bushbury or Wolverhampton. For each route there were several trucks. But as the trucks stood in the sidings they were intermingled in such a way that very considerable time must have been spent in sorting them into order of route.

Sorting in this connection must be distinguished from marshalling them into station order in the different trains on the several routes which they were intended to take. Mr. Jepson, the defendants' assistant general manager, testified

that it was not physically possible to do the south sorting on the railway sidings 1, 2, 3, and 4, as there was not adequate accommodation for the purpose, nor was any extension practicable owing to the configuration of the area, which was blocked by three bridges; and similarly he said that it was not possible physically for the applicants to do the sorting on their own sidings.

I have come to the conclusion upon the particular facts of this case, that if the applicants are to avoid this extra charge, the trucks should be tendered to the defendants already sorted in order of route. Of course, in some cases, the applicants may be able to do this, as for instance, if they had a full train load for Ellesmere Port; then no extra charge would be sustainable, except a very small charge per ton for clerical work and for signalling. With regard to the quantum of the charge, after carefully examining the figures, I think 1d. per ton is too much, and that .75d. per ton would be fair remuneration for all the services rendered.

Solicitors—Burton, Yeates & Hart, agents for Johnson & Co., Birmingham, for the applicants; M. C. Tait, for the defendants.

THOS. W. WARD, LIM. v. MIDLAND RAILWAY CO.¹

Classification of Merchandise—“Scrap Steel”—Legality of Rate—Jurisdiction—Increase of Rate—Railway and Canal Traffic Act, 1888 (51 & 52 Vict, c. 25), s. 10.

July 25, 26, 27. October 12, 1916. March 21, 22, 1917.—Old files were consigned over the Midland Railway to the applicants'

(1) Before Lush, J., and Commissioners the Hon. A. E. Gathorne-Hardy and Sir James Woodhouse, sitting at the Royal Courts of Justice, London.

works, and after being sorted a large proportion were reconsigned over the railway for export abroad, where they were stated to be used as knives or scrapers. Propeller shafts or parts thereof removed from broken-up ships also were consigned over the railway to persons who used them to build up machinery. In both cases, class B. rates had been charged as for "scrap steel," but subsequently the railway company—an entry of "Files and Rasps, old," having been made in class C. of the General Railway Classification—claimed to charge class C. rates for the files as old files, and also for the propeller shafts as being "Shafts of screw propellers," which are included in class C. of the statutory railway classification.

The Railway Commissioners, having held (a) that there had been no increase of rates, (b) that they had jurisdiction under section 10 of the Railway and Canal Traffic Act, 1888, to determine the identity of the above articles, inasmuch as that question must be decided in order to determine the legality of the rates claimed to be charged, which was the subject-matter of the dispute; and (c) that the said articles were properly described as "scrap steel," and therefore chargeable at class B. rates.

Held, by the Court of Appeal affirming the above decision, that the Railway Commissioners had jurisdiction under the said section to determine the identity of an article to which a disputed rate was sought to be applied, and that the question of such identity being one of fact, there was evidence in support of the decision of the Commissioners, which therefore could not be interfered with.

These were two applications. The first was for a declaration that scrap steel files in minimum loads of four tons per truck were scrap steel within class B of the classification annexed to the defendants' Rates and Charges Order, 1891. The second was for a declaration that steel propeller shafts which had formed part of broken-up ships were scrap steel within class B of the same classification.

The applicants were dealers in iron and steel scrap at Sheffield and other places, and also carried on business as ship breakers at Morecambe. They purchased large quantities of old files which were forwarded over the defendants' railway to their works at Sheffield, and which were there sorted out. A large proportion, being those still capable of some kind of service, were then reconsigned over the railway to various ports for shipment abroad, where they were stated to be used as knives or for scraping purposes. No work was

done upon these exported files except that a certain amount of dirt and rust was knocked off during the process of sorting. For many years this inward and outward traffic had been charged for at class B rates. In September, 1908, an addition was made to the General Railway Classification under the heading "Files and Rasps (Old) for recutting or remelting—Class C, Iron and Steel List," and in June, 1911, the entry was amended by omitting the words "for recutting or remelting." The traffic was consigned as "Scrap steel files," and prior to September, 1909, had been carried at class B rates, after which date the defendants had charged class C rates. Class 2 of the statutory classification annexed to the defendants' rates and Charges Order includes "Files or rasps, iron or steel." With regard to the disused propeller shafts, the applicants in the course of their business had broken up old ships at Morecambe, and in certain cases consigned the propellers, or parts of them, after the linings had been removed, to customers in various parts of the country who used them for building up or forming part of machinery. The shafts varied in size from 33 feet to 6 feet in length and from 22 inches to 6 inches in diameter.

Between 1906 and July, 1914, the shafts, which were variously described, were charged for as scrap steel at class B rates; after the latter date the defendants claimed that they were entitled to charge the class C rates applicable to shafts of screw propellers.

The applicants also claimed a declaration in both cases that the defendants by charging the higher, class C, rates had illegally and unreasonably increased the rates on the said traffic. The defendants denied that the rates had been increased, and contended that the above traffic was misdescribed as scrap steel, and that it had in fact consisted of old steel files and steel propeller shafts, and was chargeable as such.

Evidence was given on behalf of the applicants to the effect that the above articles were commercially described and dealt

in as "scrap," and that the defendants themselves had sold old files under that description.

In the course of the hearing before the Commissioners the defendants raised the objection that the Court had no jurisdiction to decide what rate ought legally to be charged for articles of which the true character and description were in dispute, and that section 10 of the Railway and Canal Traffic Act, 1888, under which the Commissioners have jurisdiction to decide any question involving the legality of any rate or charge, did not apply to the present case.

Ultimately the questions left for decision were:

1. Whether the articles in question were in fact old files and propeller shafts on the one hand or scrap steel on the other? and
2. Whether the Court had jurisdiction under section 10 of the Traffic Act, 1888, to decide the legality of the rates which the defendants claimed to be entitled to charge for such articles.

R. Whitehead, K.C., Holman Gregory, K.C., and E. Clements appeared for the applicants.

Sir J. Simon, K.C., G. J. Talbot, K.C., and C. H. G. Campbell for the defendants:

On the question of jurisdiction in previous cases referring to classification the identity of the article has not been in dispute—see *Bovril, Lim. v. Great Western Railway Co.*,¹ *Beeston Foundry v. Midland Railway Co.*,² *London & North Western Railway Co. v. Society of Motor Manufacturers, Lim.*³ The proper remedy is a common law action. *Davis v. Taff Vale Railway Co.*⁴ was also referred to.

(1) *Ante*, Vol. XII. 151.

(2) *Ante*, Vol. XIV. 119.

(3) *Ante*, Vol. XIV. 294.

(4) [1895] A. C. 542.

LUSH, J.: The applicants in the first of these cases have applied to this Court for relief against what they say are excessive and unauthorised charges which the railway company have made for the carriage of large quantities of old and discarded files. The real question that is raised and which we have to decide is this: Whether the articles in question come properly under the description of "old files," in which case (if they are carried as these were in not less than 4-ton loads) the authorised rate is the rate in class C for old steel files in the company's classification, or do they come under the description of "scrap steel" for which the class B rate is the proper one? The defendants say that they come under the former description—that they are steel files, although old steel files. The applicants say that they come under the latter description—that they are "scrap steel" and not files at all.

There are two sub-divisions of this traffic, which I must consider separately. There is first the import traffic, that is, the carriage of the articles in question to the applicants, who had bought them and for whom they were carried in course of delivery, and there is secondly the export traffic, that is, the carriage of certain portions of the original consignments which the applicants had sold and despatched on the defendants' railway to a port for shipment to the applicants' foreign customers. The export traffic was not mentioned in the application, but the parties desired that it should be dealt with, and we treated it as raised in the case.

The facts, so far as it is necessary to detail them, are these: The applicants, who are iron and steel merchants, have for many years been in the habit of tendering for and purchasing scrap iron and scrap steel. They purchase it in large quantities at so much a ton and of course at comparatively low prices. These "old files," as I will call them for the moment, which have been carried by the defendants for the applicants, and which are the subject of the dispute, had been used by engineering firms until, at all events for their pur-

pose, they had become worn out and no longer useable. A large number of them were broken. They were scrapped and sold by tender to the applicants as scrap steel or scrap files. They were sold at the low scrap prices at so much a ton, and were, as I have said, carried for and delivered to the applicants. This was the import traffic. The applicants did not remelt all these "old files." They sorted a large quantity—more than 50 per cent.—out from the heap and sold these in different parcels to foreign customers. They were not sharpened or repaired or subjected to any process to restore their condition as useable files. This was the export traffic. Different considerations, I think, apply to these two classes of traffic. For many years the defendants treated the goods so carried (both import and export traffic) as scrap steel, and charged for them as such under class B. They had no other designation for them at that time in their classification than that of either "scrap steel" or "steel files." The statutory classification divides them into these two classes only. In 1909 the defendants added this entry to their list of rates: "Files and rasps, old, for recutting or remelting. Class C"; a short time afterwards, in 1911, they omitted the words "for recutting, etc.," leaving then a description of files in their classification, namely, "files and rasps, old." Each of these classes was subject to its own appropriate rate in class C. Soon after the first of these new entries was made, the defendants began to put forward a claim to treat similar consignments to those which they had carried before as scrap steel as coming under the description "old files" and to charge for them under class C. The applicants resisted the claim and refused to pay more than was chargeable under class B, and deducted the difference in the payments that they made. The defendants were not always consistent in their mode of dealing with the goods. On some occasions they treated them, as they had done originally, as scrap steel and charged accordingly. The goods have generally been described throughout in the consignment notes as "scrap files." The

defendants, however, continued to press their claim, and ultimately the applicants (who have paid in some cases under protest) commenced these proceedings. They ask for an order declaring that scrap steel files in four-ton loads are scrap steel coming under class B, and for an order declaring that the defendants have unlawfully increased their rates for the carriage of such goods (the necessary notices not having been given), and also for an order declaring that the increase is unreasonable.

It has been contended for the defendants that there has been no increase of rates, and that the real question and the only question in issue between the parties is whether the goods that were carried were "steel files" or "scrap steel," and that this Court has no jurisdiction to deal with such a matter, which it is said can be made the subject of an action at common law. It was further contended that if there is jurisdiction, this Court should not exercise it, but leave the parties to their common law remedy.

I think that the defendants' first contention is correct, and that there has been no increase of the rate. The defendants do not charge more either for files or for scrap steel than they did before. They only seek to correct what, they say, is a misdescription of the goods they carry and to charge for them at the old authorised rate which applies to them. It was suggested, though in the first case not I think seriously pressed, that we ought to infer from their long course of business, in accepting similar consignments as consignments of scrap steel, that there was an implied agreement that they would always charge for such consignments under class B, but there was no real evidence of any such agreement.

But accepting this contention I am clearly of opinion that we have jurisdiction to determine the dispute. The applicants admit that they are bound to pay the proper rate for the actual goods carried, but challenge the legality of the rate which the defendants claim to charge for them. They say that

when the true character of the goods is ascertained the rate is unauthorised. Section 10 of the Railway and Canal Traffic Act, 1888, expressly gives this Court jurisdiction to determine a dispute as to the legality of a rate, and there is no ground for suggesting that we ought to decline to exercise such jurisdiction, even though the dispute may be one which could be made the subject of an action at law. Sir John Simon and Mr. Talbot sought to distinguish these cases from the two cases which were cited in argument, *London and North Western Railway Co. v. Society of Motor Manufacturers*,¹ and *Bovril, Lim. and Virol, Lim. v. Great Western Railway Co.*² In the former case this Court decided a dispute with regard to the true classification of a chassis, and in the latter case the Court decided a dispute as to the true classification of an article of food, virol. It was pointed out in the argument before us that there the identity of the article was not in dispute, and moreover the article was of a fixed, and definite manufacture, so that the Court could deal with the question for the future as well as for the actual carriage that had taken place. Whereas, it is said, in the present case the identity of the articles that were purchased and conveyed is the matter in dispute, and it is impossible for the Court to deal with future consignments. The exact character of the individual articles sold and carried will not necessarily be the same as those in question. I agree that there are those distinctions, and I agree that we can only deal with the past consignments, but none the less the legality of the rate is clearly the subject-matter of the dispute, and section 10 therefore applies. The case of *Davis & Sons v. Taff Vale Railway Co.*,³ which was referred to, has no real bearing on the question, as that case did not turn on or relate to the section I have mentioned.

- (1) *Ante*, Vol. XIV. 294.
- (2) *Ante*, Vol. XII. 151.
- (3) [1895] A. C. 542.

Holding, as I do, that no case of increase of rates is made out, the form of application is not correct, but in substance the applicants ask to have it declared that the goods which were carried were scrap steel, and that the defendants' charges were excessive and unauthorised, and we ought to deal with the case on that footing. We cannot, as I have said, deal with future consignments, but our decision will indicate, if it does not actually determine, the rights of the parties, when similar traffic is dealt with.

How, then, ought the goods to be described on the evidence before us? The question is one of some importance. The defendants' contention in substance is this, that the description "scrap steel" in the statutory classification refers to metal which is metal and nothing more, metal which will in the ordinary course be remelted and remade into a manufactured article or parts of one. If a manufactured article is scrapped after user, but is purchased with the intention not of melting it down and dealing with it as mere metal, but of dealing with it or with parts of it as a manufactured article, and it is so dealt with, then, say the defendants, it is not scrap metal. They concede that if these disused files were bought for the purpose of being dealt with as scrap steel and if they were so dealt with, they would be charged under class B, but they say that they were not so dealt with. They say that the applicants carry on a trade with the old files or a large portion of them as second-hand files, and sell them and export them as such, to be used again as files, old and cheap no doubt, but still to be used as files, and therefore they say that what they have carried ought to be designated as files and not as scrap steel. The applicants, on the other hand, contend that the words "scrap steel" are used in a business sense, and that if ordinary persons in the trade call these old files "scrap steel" and deal with them and pay for them as such, which they say is the fact here, they are entitled to have them carried at scrap steel rates, although their cus-

tomers may not treat them as mere metal and deal with them as such.

Now, whatever be the true view as to the articles which were sorted out and exported by the applicants, I think that the scrapped files were clearly "scrap steel" when the applicants bought them and consigned them for carriage over the defendants' railway. It cannot, in my opinion, be material to enquire what their intention was, when they bought. If, when they bought the articles, they bought what in the trade was known and dealt with as scrap steel, if that was the ordinary and appropriate business name or trade description of the articles, they would be scrap steel and nothing else, whatever the applicants intended to do with them. Nor can it be material that after they had received the goods, they sold some knowing, as I assume for the moment they knew, that those which they sold would be used again in the condition in which they were. If in the business sense the whole parcel was a parcel of scrap steel when purchased, the applicants were entitled to have them carried at scrap steel rates.

I think that as regards this import traffic the applicants did establish that the old files were known and designated in the trade as "scrap steel" and that they were sold and bought as such. The defendants themselves, as well as other railway companies and engineers, had sold quantities of these old files to the applicants as "scrap steel." They had invited tenders for them under that designation and so invoiced them. Those in question were bought at scrap steel prices, at so much a ton. To describe the bargain as a purchase of files, whether old or otherwise, would in my opinion be altogether inaccurate for the purpose of railway classification. I quite agree that the mere fact that a particular engineer discarded an article, because it was no longer serviceable for his special requirements, would not necessarily make it scrap metal, but here the articles were recognised in the trade when discarded as having no other commercial value and no other proper commercial description than that of scrap. As regards the import traffic,

therefore, I am of opinion that the applicants are right and that the defendants' contention is wrong.

As regards the export traffic, the question is not necessarily open to the same observations, and I was at one time disposed to think that the sorted out "old files" were on a different footing. It is obvious that a scrap heap may comprise manufactured articles which may be selected from the heap and dealt with as such, and it would not follow, if they were separately sold as manufactured articles, that they would be properly described as scrap iron or steel, merely because they came from a heap which was so described. But I have come to the conclusion, on the facts of this case, that the sorted out articles were also scrap steel for the purpose of classification. It is true that they were sold to certain specifications according to the shape and size of the files, and it seems to me only reasonable to infer that the purchasers in the countries to which they were exported would use them or some of them either as old files or as something of that character. But I am satisfied on the evidence that, even when so dealt with by the applicants, the exported files were really known and described in the trade as "scrap steel." They were sold by the applicants at substantially scrap steel prices, at prices which were a mere fraction of those for which the commonest files are sold. They appear to be constantly, if not generally, sold at so much a ton. Scrap steel is sold by the ton, files by the pound. But however this may be, the fact that they only fetch scrap steel prices is a factor of great importance. The question what charge for carriage certain goods will bear, having regard to their value, is an important factor in determining their place in the classification. Looking at all the circumstances, I think that the true inference to draw is that the export like the import, traffic ought to have been carried (if in four-ton loads) as scrap steel under class B.

The applicants are, therefore, in my judgment right in their contention as to both classes of traffic, and are entitled to a

declaration accordingly, and to recover back the moneys they paid under protest.

In the second place, a dispute involving a similar question has arisen with respect to disused propeller shafts of old and obsolete vessels which have been purchased and broken up by the applicants. They carry on the business of ship breakers at Morecambe, and have done so for some time past. These propeller shafts, which are worn out and are no longer serviceable, have their "liners" removed where necessary, and are conveyed, sometimes entire, sometimes in sections, over the defendants' railway. Until July, 1914, the defendants always accepted them, and charged for them as "scrap steel" under class B when in four-ton loads or upwards. They then put forward a claim, similar to that in the first case, to charge for them under class C, on the ground that they were propeller shafts and not scrap steel, the reason for this change apparently being that the defendants ascertained that the shaft was not re-melted but that portions of it were cut off or removed, and utilised for building up machinery or for forming parts of machinery. The applicants refused to recognise the claim, and deducted what they alleged to be excess charges. Certain sums were ultimately paid by them under protest, which, as in the first case, they seek to recover. They ultimately took these proceedings, and claimed a declaration that the propeller shafts are "scrap steel" coming within class B. They also, as in the first case, contend that there has been an unlawful and unreasonable increase of rates. There is a further claim for damages for withholding facilities which I will deal with later.

In this case, as in the other, there has, in my opinion, been no increase of rates, nor was there any agreement to charge for the shafts under Class B. The question is, were these disused shafts rightly described as propeller shafts or were they really scrap steel? If the latter, the applicants are entitled to the first declaration which they ask.

In this case again, the evidence was that in the trade these

articles, when sold, were recognised and treated as scrap steel, and the prices paid for them were scrap steel prices. For the same reasons that I have stated in the first case, I think that the applicants' contention is right. No question arises as to what item in the classification should apply to an article which has been disused, and indeed is no longer useable, for its original purpose, but which has a recognised value still as a manufactured article. On the evidence I think that the propeller shafts were only dealt with as scrap steel, and that that was their true trade designation. The proper rate for the shafts that have been carried is, therefore, class B, and not, as the defendants contend, class C. They are entitled to make an extra charge for inconveniently large or heavy shafts, but this is not disputed.

The claim with regard to withholding facilities is this: on a recent occasion, when the dispute had become somewhat acute, the defendants refused to carry one of these shafts, unless the applicants would describe it as a shaft, which they refused to do. The defendants thereupon unloaded it and left it in their yard at the applicants' risk, and there it has remained. It was an unfortunate and regrettable incident, and one that ought not to have occurred. There were more ways than one of obviating the difficulty. We were told that there was a good deal to be said as to the defendants' reason for taking the course they did, and the matter was not pursued, so that we are not in a position to say where the blame chiefly rests, but I cannot help saying that, if similar difficulties should arise again, some way ought to be found, and I hope will be found, to avoid a course being taken which is, to say the least, unfortunate and injurious to the public interest. I do not think that any order should be made in consequence of the defendants' action in the matter.

The applicants are, in my opinion, for the reasons I have stated, entitled to the first declaration that they ask and to recover back the moneys which they have paid under protest.

SIR JAMES WOODHOUSE: The question we have to determine in this case is whether steel files carried by the railway company are "scrap steel," within the meaning of the railway classification and, as such, subject, when carried in not less than four-ton loads, to be charged at a "class B" rate; or whether they are chargeable as "steel files" as classified in class 2.

The applicants have carried on an extensive business at Sheffield and elsewhere as dealers in scrap iron for over thirty-five years, and pay as much as £150,000 a year in railway rates. There is no dispute that scrap iron or steel is chargeable at "class B" rates. What is in dispute is whether certain articles carried by the defendants are properly so described, or in other words are, in fact, "scrap." The articles in question are disused or discarded files: that is, files used in connection with engineering businesses, which have become broken, or the teeth of which are so worn down or deteriorated as to render them no longer serviceable for the purpose for which they had been used. In large engineering works these old or useless files are cast on one side, and ultimately disposed of to "scrap" dealers, who buy them by the ton by tender. The goods in this case are conveyed in open trucks in not less than four-ton loads to Sheffield, and have been usually described as "scrap steel files," sometimes as "old files." When they arrive at their destination, they are taken to the applicants' yard and there thrown into a heap. Afterwards they are sorted out. Some of them are in a very dirty state and very rusty, and the dirt or rust is shaken off by striking them with a hammer or with another file when sorting. No other work is done upon them. A large portion of these files are then sold for export to the East, the remainder are melted down. Those exported used to be consigned by the defendants' railway to a port for shipment, such as Hull or Middlesbrough. For this purpose they were packed in barrels, as shipowners would not carry them in bulk owing to their sharp points. According to the evidence, the bulk of the exported

files now go to the ports by canal instead of by rail, owing to the advance by the railway company in the rate which is now complained of. The dispute between the parties covered both the inwards and the outwards traffic.

According to the case for the applicants, the rates charged for carriage of scrap files down to 1895 was "class B" rate. In 1895 an entry was made in the Clearing House classification, the effect of which was to fix the rate for scrap iron and steel at something over the pig iron exceptional rate, which was in effect, it was contended, a reduction. In 1908 a new entry appeared in the Clearing House classification, namely, "Files and rasps old, for recutting or remelting." These were put into "class C" (Iron and Steel List). After that entry the defendants began to charge for consignments of scrap files "class C" rates. It will be observed that the effect of this entry in the Clearing House classification was to make a distinction between original files (that is new files) on the one hand, and old files, as distinguished from scrap files, on the other, and if used for recutting and remelting, they were to be charged "class C" rates.

On June 1, 1911, the Clearing House classification was again amended by "deleting the words 'for recutting or remelting,'" leaving the entry "Files and rasps old" "class C." It was established by the evidence that since 1909 the applicants had been charged in respect of all scrap files carried, whether described as "scrap files," or sometimes as "old files" the "class C" rate, which the applicants alleged amounted to an illegal increase of rate. That there were exceptions to this was shown by the accounts produced, such as, when on September 15, 1909, for the carriage of materials described as "scrap files" in the accounts, the "B" or scrap rate of 4s. 5d. was charged. Similar entries appeared on October 13, 1910, February 5, 1913, and February 15, 1915, and it was said that the materials carried were of a precisely similar character to the others, namely, scrap steel files. Two accounts of the defendant company against the applicants

were put in evidence before us from September, 1909, to September, 1915; (a) one delivered before action brought and (b) the other after action. In the former the words "scrap files" appeared in the description of the article carried, in the other the word "scrap" had been erased. These accounts included all the "outstandings" on all the consignments between these dates for inwards or outwards traffic in files. Wherever in these accounts the applicants had been charged a rate in excess of the "B" rate, this had been objected to by them, and a deduction made by them of the excess. Ultimately, under pressure from the defendants the charges were paid under protest and without prejudice, and it is under these circumstances that they apply to have the dispute determined.

As to inward traffic, I feel no difficulty in coming to the conclusion, upon the evidence, that the articles hitherto carried as "scrap files" or "scrap steel files" are properly described as "scrap" within the meaning of the classification and are not chargeable (when in not less than four ton loads) at any higher rate than the "B" rate. It was not denied that the defendant railway company were themselves very large users of steel files at their engineering works at Derby. Periodically they had sales of "scrap." For this purpose they prepared a form of tender headed "Tender for the purchase of scrap steel and iron." One for the year 1911 was exhibited. It contained a detailed schedule of numerous articles for sale embraced under this comprehensive designation of "Scrap." One item was twenty-eight tons of "Scrap steel files." Persons tendering were offered the opportunity of inspecting at the company's stores depot "specimens of the scrap before tendering." One of the conditions of the tender was that the railway company would deliver the scrap as it was produced during the year, and would load the materials into their own trucks, but the purchaser should pay the carriage and all charges. The applicants tendered and bought the stock of "scrap steel files." They were consigned by the

railway company as the vendors to the applicants in open trucks over the defendants' own railway to Sheffield. In the consignment note made out by the railway company as vendors and in their own invoice the goods were described by them as "scrap files." It is difficult to see how it is open to the defendants to establish here the defence set forth in the pleading, that they were unaware of the nature of the traffic, or that, in charging, as they did in this case, the "B" rate, they were so charging it by inadvertence. The defendants, by way of explanation, said that the rates department were not cognisant of what was done by the engineering department, which was responsible for the sale and despatch of the material. No one was called from the engineering department, and I am not satisfied with the explanation, nor do I think it consistent with the evidence. Consignments of a like character over a long series of years were received not only from this railway company but also the Great Northern Co. and Great Western Co., and from engineering works like Armstrong's. But assuming that the files which are the subject-matter of the inward traffic are determined to be scrap, it is nevertheless suggested that different considerations arise as to the outward traffic, and it is argued that the files which are the subject of the export traffic, though old files in the sense that they are discarded files, are yet commercial articles and not "scrap," that they are intended to be put to a commercial use and should therefore be recognised as coming within the designation of "class 2." In the statutory classification there are no intermediate distinctions—a file is either a file under "class 2" or scrap under "class B." The classification is for the purpose of fixing the rate, and one of not the least important factors entering into the question of how their articles should be classified is their value. Now new files, carried under "class 2," as originally manufactured, are made to a specification and are sold by the makers not by the ton but by the pound. In these the applicants never deal. They only trade in disused files. The

value of new files varies from 9d. per lb. to 3s. per lb., that is, from £84 per ton to £336 per ton. The commonest files used are sold for not less than 8d. per lb., and even files wasted in the course of manufacture, and outside the designation of scrap, fetch from 4d. to 6d. per lb. Scrap files, on the other hand, in which the applicants trade, are bought by the ton and normally at from £4 to £6 per ton; present prices are about £10 per ton or more, or, if measured in pounds, about .75d. per lb., or less than one-tenth of the value of the commonest new file. Of the sorted files exported, they are sold at from £8 per ton minimum to £10 5s. a ton maximum, and are never sold at more than one-sixth of the price of the commonest files.

I think that these files which were bought as scrap, which have undergone no process of re-manufacture, but have been merely re-sorted from those which are broken and are only fit for re-melting, which differ so enormously in value from new files, and which are resold at a mere fractional profit of £1 per ton, remain in fact scrap within the meaning and intention of the classification. These exported files to whatever purpose they are put, are not new files but are old or scrap files. I see no ground for drawing a distinction between "scrap files" and "old files." There is internal evidence in the statutory classification itself, that the terms "scrap" and "old" are convertible terms as, for example, "old or scrap lead" in "class 1."

For these reasons I think that the goods, which we have been considering in the accounts of the defendants brought before us, are scrap files, and should be charged for at the rate not exceeding the class B rate, and that any excess in charge beyond that rate should, if paid, be refunded to the applicants. Upon the question of the Court's jurisdiction, we intimated our opinion during the course of the hearing that the objection could not be sustained, and I agree with what the learned Judge has said upon that point.

HON. A. E. GATHORNE-HARDY: I agree with those two judgments. My judgment is confined to the second case.

The applicants are iron and steel merchants in a very large way of business, and one branch of their trade which they carry on at the old harbour of Morecambe, leased by them from the railway company, is that of shipbreakers. They purchase and break up old disused vessels, and consign the various parts to customers, usually by railway. In the present case the difference between the parties, which we have to determine, has arisen with respect to old steel propeller shafts taken out of vessels, and consigned to purchasers in Sheffield, Swansea, Wigan, Leeds, and other places.

Between 1906, when they commenced the Morecambe branch of their business, and February 18, 1916, when these proceedings were commenced, the applicants have on many occasions sent these old shafts over the defendants' railway. The shafts varied greatly in size, the largest being as much as 33 feet in length and 22 inches in diameter, while some were as small as six feet in length, and six inches in diameter. They were described in the consignment notes under a variety of descriptions, such as "scrap steel shafts" or "undamageable steel shafts," but always under descriptions tending to show that they were "scrap" in the view of the consignors. Where the articles were of an unwieldy character an additional charge of one-fifth of the rate was made in the case of articles weighing between ten and fifteen tons, but as to this charge there is no dispute. The substantial question which we have to determine is whether these articles are entitled to pass at the rate specified in class B of the defendants' statutory classification, as "Iron and Steel Scrap in minimum loads of four tons per truck," which is the applicants' claim, or whether, as the defendants contend, they should be charged a higher rate, namely that specified in class C as "Shafts of Screw propellers, iron or steel." To put it shortly, are they "Scrap" or "Shafts"?

A further question was raised by the applicants in their

pleadings and argument, namely, whether the defendants had not by their conduct prior to July, 1914, to use Mr. Whitehead's phrase, "established a usage as between the parties which justified the applicants in saying that there was in existence at the end of that period a rate which had been increased." If so, as no notice of the intention to increase the rate has been given, and no justification pleaded or established, the applicants would be entitled to succeed, but I am clearly of opinion that the evidence falls far short of establishing such an uniformity of charge as would justify us in inferring such a usage. I think that throughout the whole period a *bonâ fide* dispute existed between the parties, and that the defendants, whenever they knew that the article carried was not intended for melting up, or reforging, claimed to be paid the class C rate, or an exceptional rate higher than class B. There has been no raising of a rate within the meaning of the legislation of 1894. There remains the substantial question whether these old steel propellers are "scrap" within the meaning of the classification, and entitled to be carried in 4-ton loads at class B rates. It appears to me that we ought to determine this question as a jury would have done, had the point arisen in a Common Law action, on broad principles with strict regard to trade usage and opinion. What would these disused propellers be considered in the trade by merchants and carriers? After a careful consideration of the whole of the evidence I have arrived at the conclusion that the propeller shafts of which the witnesses have spoken are entitled to be described as "scrap, class B." They are certainly not shafts in the commercial sense of the word. They could not be used for their original purpose, nor could they be considered as second-hand machinery capable of being used without having any fresh work done upon them. Their selling value, as Mr. Ward deposed, was 1/10th to 1/20th of new shafts. They were nothing but rough material for machinery, although sometimes, instead of being melted or reforged, portions of

some of them were cut off and returned and fitted as parts of new machines to the extent, and in the manner to which one of the witnesses, Mr. Berry, deposed.

When taken out of their place in the ship they were stripped of their "linings," that is the gunmetal collars placed round them to prevent friction, and sometimes this had to be done by the use of dynamite. Often they were corroded, or damaged by use, and sometimes they were sawn into two or more pieces before consignment. Parts of them were occasionally used as portions of new hydraulic machinery, but work had to be done on them to adapt them to these uses. They were really used, even in these instances, as material only, and not for reasons of economy. When purchased they were put on the scrap heap in the yard until wanted, and if it was required to make anything in a particular hurry, when it would have been necessary to wait for some time to purchase a forging from a manufacturer, one of these shafts was taken, and a piece cut out of it and used to manufacture the article required, because it was a saving of time. There was no saving in cost. The price before the war was £4 10s. to £5 10s. for these articles as compared with £14 to £8 10s. for steel forgings to specification, and at the present time the comparison is between £7 10s. to £8 10s. and £22 to £30.

Among the witnesses called on behalf of the applicants were Mr. Hughes, managing director of Messrs. Hughes, Bolckow, & Co. of Middlesbrough, where his firm carries on a large business as shipbreakers. He gave evidence that he always consigned these articles as "scrap," and also that he always paid the "scrap" rate, but as the railway on which his place of business was situated was not that of the defendants', this can only be taken into account as a factor in determining the usage of the trade. Mr. Richardson, and Mr. Sowter, forge masters, deposed that they purchased these articles from the applicants, and always made use of them for reforging.

The defendants then called their goods manager, Mr. Evans, who deposed that when his company knew, or were assured that these articles were consigned for the purpose of reforging, they carried them at class B rates, but in other cases they charged a higher rate, generally C. There was really no conflict as to the facts, and what the Court has to determine is which contention should prevail.

As I have stated, I think that these articles are rightly entitled, for purposes of carriage, to be consigned as "scrap, class B." They are not secondhand machines, capable of use for their original purpose without fresh work being done upon them, but old material, and in coming to my conclusion I have regard to their nature, value, use, undamageable character, and method of consignment and conveyance. Of course the usual addition to the rate must be paid where the articles are of an unwieldy nature, and exceed ten tons in weight. I therefore hold that the applicants are entitled to recover the excess of such higher rates as have been paid by them under protest, and to call upon the defendants to convey to its destination the propeller ex the "Majestic" which has unfortunately been unloaded at Leeds. With regard to this latter I think it unfortunate that some reasonable arrangement was not come to between the parties, without prejudice to their respective contentions, by which delay, inconvenience, and expense might have been avoided, but, as Sir J. Simon tells us that we have not heard the whole story, I am unwilling to apportion the blame. We cannot, of course, make any such declaration as to the future as the applicants ask for in paragraph 13 (1) of their application. Whether any future consignment does or does not answer a particular description in the classification must always be a question of fact.

SIR JAMES WOODHOUSE: I am of the same opinion.

The defendants appealed.

Sir J. Simon, K.C., G. J. Talbot, K.C., and C. H. G. Campbell, for the appellants.

With regard to jurisdiction, the word "legality" in section 10 of the Railway and Canal Traffic Act, 1888, means that the Commissioners can decide whether a railway company has power to charge a particular rate and, if not, the rate is illegal. Here it is not disputed that all the rates are legal; the only question is whether the rates apply to a particular traffic, and this depends upon the true nature of that traffic, and not upon the charging powers of the company. With regard to the nature of the traffic, "scrap steel" means fragments and odds and ends of steel and not commercial articles; the question of law is what does "scrap" mean in the statutory classification.

R. Whitehead, K.C., Holman Gregory, K.C., and E. Clements were only called upon to argue as to the nature of the exported files and the propeller shafts.

C. H. G. Campbell, in reply.

LORD COZENS HARDY, M.R.: This is an appeal by the railway company against an order of the Railway Commissioners made at the instance of traders. The appeal raises one question of general importance, namely as to the extent of the jurisdiction of the Commissioners; and if that point is decided in favour of the jurisdiction of the Commissioners, then the second point is whether there were materials before the Commissioners which enabled them to decide as a question of fact what they did decide.

Originally it was held that the Commissioners, or their predecessors, the Railway Commissioners, had no right to decide as to the legality of a rate at all, and that that had to be decided in an action at law. But in 1888 a committee investigated the whole matter at great length, and as a result of the committee's report, the Railway and Canal Traffic Act of 1888 was passed. Section 10 of that Act provided this: "Where any question or dispute arises involving the

legality of any toll, rate or charge, or portion of a toll, rate or charge charged or sought to be charged for merchandise traffic by a company to which this part of this Act applies, the Commissioners shall have jurisdiction to hear and determine the same, and to enforce payment of such toll, rate or charge, or so much thereof as the Commissioners decide to be legal."

Now in the present case there was a dispute between the traders and the railway company of this nature: the railway company said, "These things, in respect of which we are charging or seeking to charge are not scrap within the meaning of the language of the Charges Order, namely, scrap steel or scrap iron; they are files and propeller shafts." That being the dispute, the matter came before the Railway Commissioners.

The argument of the railway company has been this: section 10 is of no wider application than this: it enables the Commissioners to decide whether the toll, rate or charge is in excess of the company's powers; it does not extend to any case in which, it being admitted that the schedule of charges is proper, the only question is as to the identity of the goods in respect of which the dispute arises, and whether they ought properly to be charged as files, or as scrap steel or scrap iron. Now I cannot read section 10 in the narrow sense in which the applicants view it. It seems to me that it clearly applies to the case where the question for decision is whether a legal charge in respect of a particular article was properly charged against the particular trader, who says: "The article for which you make that charge is one which does not fall within that description." In my opinion, apart from authority, I think the jurisdiction of the Commissioners under section 10 plainly includes a case like the present, and I see no grounds for cutting down its meaning. And this has been the view which has been taken by the Commissioners in every case to which our attention has been called. It is true that the point may have been

assumed rather than argued and decided, but there are some points which are not argued because they are looked upon by counsel as so hopeless that they cannot really be relied upon.

The first case, I think, is the case of *Bovril, Limited v. Great Western Railway Co.*,¹ and the question there was whether virol was an article not specified in the classification, or whether it was included under a particular heading in the classification. Bigham, J., said: "It is said in this case that the question which we have to determine is a question of law. I regard it as a question of fact. The conclusion that we have unanimously arrived at is that this article is not properly described as an 'extract' or an 'essence,' and that it is in fact better described as a mixture of different component parts. As it therefore does not clearly come within the expression used in the new order, we think that the railway company must carry it as heretofore under the provisions of class 3, as being an unclassed article." That, of course, is a direct decision on the point, although it is quite true that that point was not taken by counsel in the argument. But it is a decision upon section 10; it is a decision asserting the jurisdiction of the Commissioners to determine whether or not a particular article does or does not come within one or other of the provisions of the classification. But that is not all, because subsequently the question arose in two cases before Lawrence, J.

In the case of *Beeston Foundry Co. v. Midland Railway Co.*,² goods were consigned by the description of bundles of water pipes; they were really what we now call radiators; and the question came before the Commissioners as to whether they properly came under the description of "bundles of pipes." The Commissioners dealt with that, and they said that if the railway company wanted any modification they must get an additional classification, but they assumed with-

(1) *Ante*, Vol. XII. 151.

(2) *Ante*, Vol. XIV. 119.

out doubt that they had jurisdiction to decide the point strictly in the manner in which it was decided.

Perhaps the strongest case of all is in the same volume; the *London and North-Western Railway Co. v. Society of Motor Manufacturers and Traders, Limited*.¹ The question was whether a motor chassis is a carriage within the meaning of part 3 of the schedule annexed to the railway company's Rates and Charges Order. That is a distinct decision on this very point. I shall not read the judgments of the learned judge and the Commissioners, but it seems to me that they assert and endorse the view that I have taken. The question was whether a chassis drawn in a particular way was or was not a carriage within the schedule, and they dealt with the matter under section 10 of the Act of 1888 according to what seems to be its clear meaning. I assume, therefore, that the Commissioners had jurisdiction to decide this matter.

Having dealt with that, I also think that the question of fact is not for this Court, but is for Commissioners. If there is no evidence upon which the Commissioners could make a finding of fact, then it becomes a question of law, but if they had evidence upon which they could find, it is not for us to interfere. In fact we have no jurisdiction; our jurisdiction is limited to questions of law.

Now what are the facts? They may be divided into two classes: one is the question of what I may call, to use a neutral word, "discarded" files. That is the word used by one of the witnesses, and it is the word used by one of the Commissioners. A vast number of files are used. I was rather struck with the fact that in the Midland Railway Co.'s. list of what they call scrap, amongst files there were twenty-eight tons in one year, apparently from their Derby works alone. The process stated in regard to the files is this: When at an engineering works, such as the Derby works of the Midland Railway Co., any files become no longer fit to be used, they are

discarded, and are thrown upon the scrap heap. The scrap heap, consisting of many tons, when it gets very big or unwieldy, is then sent by rail in the condition in which it is, to Sheffield, where the present traders with whom we have to deal, Messrs. Ward, carry on a very large business in dealing with articles of this kind.

The first point is this: It was said in the Court below, but not seriously argued here, that these files are not iron or steel scrap at all; that they are files; that if they are looked at, it will be seen that they are files, and that they are files none the less because they are very much worn. The form of tender issued by the railway company to Messrs. Ward for scrap contained an enormous number of different articles, both of steel and wire, of every variety of weight and structure, and amongst them were twenty-eight tons of files. So it was not a very hopeful contention that when they sold to Messrs. Ward these twenty-eight tons of discarded files from their works they were not scrap steel or scrap iron within the meaning of the words. And that has not been pressed here; in fact, no claim has been made in respect of it.

But then there is a curious process afterwards. Out of the scrap files sent to Messrs. Ward's premises, a certain proportion was sorted, and certain files of a particular length, and of a particular shape, were put in different heaps, and it is established that Messrs. Ward have orders or specifications, sent from the East, mainly from India and China, and sometimes from Japan, for old files, which are sent out to the East in pursuance of such specifications, at an exceedingly cheap price; that is to say the eastern customers are ready to take discarded files of this nature, when for the purposes of English trade they would be of no value at all. The precise use that is made out of them is a little obscure. It is said that in India they are sometimes used for scraping ship's bottoms. It is said that in China they are somehow or other used for knives. Now it is said that they are properly described as scrap steel because they are no longer useful for the purpose

for which they were originally made, and that it is wrong to call them files when nobody would buy them as files to be used for that purpose, and when no work has been done upon them. The position is that there is a scrap heap admitted to be scrap steel, from which a part is taken and sent away without having anything done to it, and that that part is therefore scrap steel. In my opinion there was ample evidence which justified the Commissioners in saying that the whole of the scrap heap was scrap steel, and they were not bound to say that it ought to be treated for the purpose of export carriage as old files. It is not for me to say whether I should have come to the same conclusion; but by that remark it must not be taken that I have any doubt on the subject. But whether I have doubt or not, I think it is quite clear that there was evidence before the Commissioners which justified them in finding as they did, having regard to the trade use of the term, to the commercial description that is well known, and the application of that commercial usage to the language of the classification; for we must take terms, such as you find in the classification, with reference to the usage of commercial men who are using the articles. There are a number of words in the classification which to me convey no idea whatever. Our attention has been called to some of them, but you must in a case like this, allow years of commercial usage to point to the sense in which in the world of commerce the words are found and are used. In my opinion, therefore, as to the files, there is no ground whatever for interfering.

Then the other matter is this. There is no export trade in the second case: it is all material coming in to works. It deals with propeller shafts, which are taken out of ships when they are broken up. A photograph was used showing part of a shaft taken from the "Majestic." I do not know the total length of the shaft, but I think counsel assented rather to the view that originally this shaft was from 100 to 150 feet long. It is made up of sections, and the sections differ

in size. These sections have to be taken apart and divided. They can never be used again as shafting on the ship; that is quite clear on the evidence. But it is said that, if you were so minded, you might take a section, and you might by great ingenuity and at great expense possibly apply and use it for the purpose of a hydraulic ram. That is not a commercial use of it; no one in his senses would do that except possibly at a time when it was extremely difficult to get proper new materials.

In my opinion there was evidence which justified the Commissioners in saying that this section of shaft, whether you take it as it is shown in the photograph or in a still further broken up shape, was within the meaning of trade usage "scrap steel," and was not a shaft within the meaning of the classification. That being so, it seems to me that we cannot interfere; it is a question of fact upon which the Commissioners have given their decision; it is not for us to say whether they were right or wrong in that, but again it must not be assumed that I have any doubt as to the accuracy of their decision. In my opinion, the appeal fails, and must be dismissed with costs.

WARRINGTON, L.J.: I am of the same opinion. The first question arises as to whether the Commissioners had jurisdiction to entertain and determine the question that came before them. The jurisdiction depends on section 10 of the Railway and Canal Traffic Act of 1888, which is in these terms: "Where any question or dispute arises involving the legality of any toll, rate or charge, or portion of a toll, rate or charge charged or sought to be charged for merchandise traffic by a company to which this part of this Act applies, the Commissioners shall have jurisdiction to hear and determine the same and to enforce payment of such toll, rate or charge or so much thereof as the Commissioners decide to be legal." In this particular case the railway company seek to charge the traders a certain rate for two particular

species of merchandise traffic; in the one case for discarded steel files bought and sold and dealt in by the traders, and in the other case propeller shafts or the sections thereof taken from steamships, and also bought and dealt in by the traders. The traders deny the right of the railway company to make the charge they seek to make, and say that the only charge they are entitled to make is a lower one. That seems to me in plain terms to raise a question or dispute involving the legality of the charge which the company are seeking to make, within the plain terms of the section. It is contended on behalf of the railway company that the jurisdiction only arises when the question is as to the legality of the charge which the railway company enter in their list of charges, as those which they propose to make in connection with the classes of goods described therein, and does not extend so as to enable the Commissioners to determine a question between the railway company and the traders as to the concrete instances of goods which may or may not come within those descriptions. In my opinion there is nothing in the section to limit the jurisdiction of the Commissioners in the way for which the appellants contend.

The case is not directly covered by authority, but there are three cases referred to by the Master of the Rolls, in which questions almost the same as that raised in the present case arose between traders and a railway company; and in not one of those three cases was it so much as suggested that the Commissioners had not jurisdiction to try the question. In the third of them, the *London and North Western Railway Co. v. Society of Motor Manufacturers and Traders*,¹ the question was, I think, precisely the same. It was a question whether the company were entitled to charge a rate for a motor chassis as for a carriage, or on some other footing. I think that is exactly the question we have to determine; and it does not seem to have occurred either to counsel or to the Judge or the other two Commissioners that

there was any question but that the dispute was one which the Commissioners had jurisdiction to determine. So far as that part of the case is concerned, I think the order of the Commissioners was right, and must be affirmed.

Then the substantial question apart from jurisdiction is whether discarded steel files are, according to the true construction of the classification, to be charged under class B as "scrap iron or steel" carried in a minimum load of four tons per truck, or whether they ought to be charged at a rate under class 2 as "files or rasps, iron or steel"—with this modification, that the railway company have consented since 1909, to place them in class C if they are old files, that is at a lower rate than they would be entitled to under class 2. That, of course, is a question of construction, but it is only a question which can be determined when you have ascertained the meaning in a commercial sense of the terms which are used, because these Rates and Charges Orders represent in fact the settlement of questions between railway companies and traders, and a Court asked to interpret them must know the sense in which the railway companies and the traders use what are in fact technical terms. Now in the case of these files, it seems to me that there was abundant evidence before the Commissioners to justify them in the conclusion of fact to which they came, that there was a trade designation for such things, and that that trade designation brought them under the description of scrap iron or steel. Then, that being so, the construction of the classification follows as a matter of course. From the decision on the point of fact there is no appeal to this Court, if there is evidence on which the Commissioners could properly act. I think there was, and I think therefore that their decision so far as the files are concerned is one which must stand. But with regard to that I should like to add this: it is admitted that the heap of files carried by the railway company from the works where they were discarded to the premises of Messrs. Ward must be treated as in a commercial sense scrap steel, and for the simple reason

that the railway company so treat it themselves in the form of tender which they issue to the merchants for the sale of these things. Now those which are exported are merely part of that which has been brought to the traders' store-houses, and which admittedly must be treated as scrap steel, and I fail to see any distinction between the files mixed up with others and the files separated from those others, and sold by themselves. Nothing has been done to them; they remain in exactly the same condition except that a certain amount of rust and dirt has been knocked off; they are the same things as have been brought into the store-houses of Messrs. Ward and properly charged as scrap steel.

The second species of merchandise as to which the question arises are propeller shafts; or more accurately, the separate sections of propeller shafts taken from discarded ships by Messrs. Ward, who act in this respect as ship breakers; that is to say, these things are masses of steel originally intended for and used as the sections of the propeller shafting of a steamer, but are now mere masses of steel not capable of being used for that purpose at all; possibly they are capable of being used after a considerable amount of work has been done upon them as materials for the construction of some other form of machinery. There again it seems to me there was ample evidence upon which the Commissioners could come to the conclusion that in a commercial sense these things are included in a description of scrap steel.

Having come to that conclusion, just as in the case of the files, it seems to me that in both cases the decision of the Commissioners was right, and must be affirmed.

SCRUTTON, L.J.: This is an appeal from the Railway Commissioners, and by section 17 of the Act of 1888 no appeal is allowed from the Commissioners upon a question of fact. We are therefore limited to finding whether there are any questions of law which are brought before us.

The first question brought before us is clearly a question

of law. The railway company say that the Railway Commissioners had no jurisdiction to deal with the question which was before them. The question was this: Messrs. Ward had presented certain merchandise for carriage on which they were charged by the railway company certain rates, and Messrs. Ward said that those rates were rates which the railway company had no power to charge. Now whether the Railway Commissioners had jurisdiction to deal with that complaint depends on section 10 of the Act of 1888. Now as I understand the argument of the railway company, they say that the legality of a charge means the abstract legality of the charge for an article without reference to any particular article or any particular carriage. They say that it would be possible for the Railway Commissioners to decide whether for scrap a certain rate should be charged, but impossible for them to decide whether Jones ought to pay for a particular truck load a rate for scrap or a rate for something else. Now I cannot find any trace of that limitation in the section itself, and I think that I find traces, or more than traces, which satisfy me that the intention of Parliament was not to limit the words in that way. For the section provides that "the Commissioners shall have jurisdiction to hear and determine the same and to enforce payment of such toll, rate or charge," and by section 12 they may "award to any complaining party who is aggrieved, such damages as they find him to have sustained; . . . including repayment of over-charges." Now the Commissioners cannot possibly enforce a rate or give damages to a complaining party in respect of an over-charge, unless they find out what is the particular article which that particular party has tendered for carriage, and in respect of which he has been overcharged; and it appears to me therefore clear that the Railway Commissioners had jurisdiction to deal with this matter, a jurisdiction which in fact they had exercised without the point being argued in the three cases which were referred to by the Master of the Rolls.

The next question is: Is there any question of law in respect to the Railway Commissions' decision that certain consignments were to be charged certain rates? It is said, first of all, that there is a question of law, because this is a question of the construction of the statute. The Midland Railway Co.'s Act gives them power to charge rates not exceeding a maximum which is named in the schedule, and gives a classification with various *maxima* for various classes, and it is said that the Commissioners here are dealing with a question of construction of the Act and schedule. When one looks at the schedule in question it seems to be quite impossible for the Court to construe all its words. It contains words which are quite unknown to ordinary members of the public. If the Court is asked what is "swarf," or what is "slummage," or what are "spetches," or what is "valonia," they would not know. One of the members of the Court happens to know what valonia is, because he had a case about it. But what is "diatomite," and what are a number of other articles named in this list? It is quite obvious that the Court must have trade evidence about them, to show what articles are referred to, and it is quite obvious that what the Commissioners had to deal with in this case was whether the articles consigned were steel or scrap. The Court by the light of nature does not know what scrap is; it has to hear from the trade what is commonly treated as scrap in the trade; and it is open both to the trader and to the railway company to call evidence to satisfy the Court as to the commercial meaning of the word scrap, or of any other word used in the classification. In this case the railway company must say that there was no evidence on which the Railway Commissioners could find, as they have done, that these consignments came within the word scrap.

I am not going through the matters that have been referred to by my learned brothers. I have looked at the evidence very carefully, directing my attention to the points to which our attention was directed, and I am quite clear there was

evidence both as to the files and as to the propeller shafts, from which it was open to the Court to find that, in the ordinary trade meaning of the terms, the things that had once been files and the thing that had once been a propeller shaft were in the trade meaning, particularly as used by one section of the Midland Railway Co. themselves, scrap within the meaning of the classification.

For these reasons, without expressing any opinion whether I should have decided the case in the same way, but equally with the Master of the Rolls, not hinting any doubt as to the decision of the Commissioners, for it is not for me to decide whether they were right in fact, I think there was evidence upon which they could come to the conclusion of fact to which they came.

Solicitors—Neish, Howell & Haldane, for the applicants; Beale & Co., for the Midland Railway Co.

CHESHIRE LINES COMMITTEE *v.* JOHN BUTLER & CO., LIM., GREENHOUGH & ESPLEN, LIM., AND LEOPOLD WALFORD & CO. (LIVERPOOL), LIM.¹

Detention of Railway Company's Wagons—Demurrage Charges—Rate “free alongside ships”—Power of Commissioners to award costs when sitting as Arbitrators—Board of Trade Arbitration Act, 1874, s. 6—Railway and Canal Traffic Act, 1894, s. 2.

July 10, 11, 12, 30, 1917.—Goods for shipment consigned under a “free alongside ship” rate were detained at the railway company's goods station at Liverpool, owing to a refusal of the ship's agents to accept delivery pending the settlement of a question as to the payment of unloading charges, the railway

(1) Before Lush, J. and Commissioners the Hon. A. E. Gathorne-Hardy and Sir James Woodhouse, sitting at the Royal Courts of Justice, London.

company claiming that the transit had ended at the above station. Upon a claim by the railway company for the payment of wagon demurrage charges on the ground that (1) by a custom of the port of Liverpool, their duty under a "free alongside ship" rate ended when the goods arrived at the station nearest the ship, and (2) they had been unable to carry the goods alongside the ship owing to the refusal of the ship's agents to accept the same.

Held, that no such custom had been proved, and in any case it would have been bad as it contradicted the terms of the contract, and further, that, as the railway company had not been ready to fulfil their contract they could not rely on the refusal of the ship's agent to accept delivery, and that the claim for demurrage charges accordingly failed.

Held, further, that the limitation imposed by section 2 of the Railway and Canal Traffic Act, 1894, upon the power of the Commissioners to award costs is the same whether the Commissioners are sitting as Commissioners or are sitting as arbitrators appointed by the Board of Trade under the Board of Trade Arbitrations Act, 1874.

This was an application by the Cheshire Lines Committee to the Railway and Canal Commission, sitting as arbitrators appointed by the Board of Trade, claiming wagon demurrage charges under section 5 of the schedule to their Rates and Charges Order Confirmation Act, 1892, or alternatively for an order that the detention of the wagons in question was accommodation or services provided or rendered within the scope of their undertaking by the desire of the defendants within the meaning of Part IV. of the schedule to the above Act.

The defendants, Messrs. Butler, were manufacturers carrying on business at Stanningley Ironworks, near Leeds. Early in 1915 they had entered into a contract with the French Government to supply a large number of trench covers or shields, which were to be shipped from Liverpool to Nantes. Messrs. Butler accordingly wrote to the defendants, Messrs. Greenhough and Esplen, who were a firm of forwarding agents at Liverpool, enquiring the lowest inclusive rates for class C iron and steel work in 2, 4, and 10 ton lots to be carried from their Stanningley works and delivered f. o. b. at Liverpool. Messrs. Greenhough quoted a f. o. b. rate of 9s.

per ton to include carriage to the port and all expenses for cartage, dock dues, &c.—until the goods were on board the steamer—the above rate to be reduced by 9d. per ton in case the goods were hauled alongside the steamer only. The goods finally were forwarded at the latter rate, which was known as a “free alongside ship” or f. a. s. rate. The defendants, Messrs. Walford, were the agents of the steamer by which the goods were to be carried, and were in control of the quay from which they were to be put on board, and they refused to accept the goods from Messrs. Greenhough & Esplen, unless that firm would undertake to pay the expense of unloading the wagons on the wharf. In the circumstances then existing, that expense would have amounted to from 2s. to 2s. 6d. per ton, and Messrs. Greenhough & Esplen refused to bear this expense. In the result the wagons containing the trench covers were left standing at the applicants' goods station at Liverpool for several weeks, and the applicants now claimed demurrage against the defendants for various amounts representing the respective periods during which the goods had stood to the order of the several defendants. The defendants denied that demurrage was payable. They contended that the railway rate from Stanningley being a f. a. s. rate, obliged the applicants to carry the goods through to the ship's side; and as they had not done so, they were themselves responsible for the delay which had occurred. To that the applicants replied that by the usage of the port of Liverpool, a railway rate expressed to be f. a. s. only covered conveyance to the railway company's Liverpool goods station, and that when they had brought the goods to their goods station at Huskisson dock the duty of the applicants was at an end.

The facts and contentions are set out at sufficient length in the judgment.

F. D. MacKinnon, K.C., and Bruce Thomas appeared for the applicants.

Holman Gregory, K.C., and *F. G. Thomas* appeared for the defendants, John Butler and Co., Limited.

R. Whitehead, K.C., and *J. B. Aspinall* appeared for the defendants, Greenhough and Esplen, Limited.

E. G. Palmer appeared for the defendants, Leopold Walford and Co. (Liverpool), Limited.

LUSH, J.; This was a claim by the Cheshire Lines Committee against three defendants for demurrage of wagons. It arose under the following circumstances. Messrs. Butler and Co., Ltd., the first defendants on the record, entered into a contract with some agents for the French Government, some time before the present claim arose, for the sale of a large quantity of trench shields which were urgently required in France. They were to be conveyed over the applicants' railway from Stanningley Station to Huskisson Station at Liverpool and thence to the Alexandra Docks, one of the docks of the Mersey Dock Board, for shipment to France. The applicant charged a "free alongside ship" rate which included a terminal service at the dock where the ship would be lying.

Some difficulty had been experienced prior to 1905 in forwarding goods consigned alongside a ship at the docks. In the great majority of cases the consignees themselves used to arrange for the carting from the station, but in several cases the railway company had the carting done. To facilitate the conveyance of goods from the railway to the quay, an agreement was entered into in 1905 between the applicants and the Mersey Dock Board, whereby provision was made for having the goods so consigned hauled over the Dock Board rails to or from the place of loading or discharging by the Dock Board for the applicants. It was a term of the agreement that the applicants should make an allowance to the Dock Board for this service, the latter stipulating that if they so desired the allowance, consisting of 9d. and 8d. (1s. 5d. altogether), should be paid direct to

the shipowner or trader as nominees of the Dock Board. Of this sum 5d. was to be returned to the Dock Board, the remaining 1s. being retained by the shipowner or trader for defraying the cost of loading or discharging the goods at the dock. The Dock Board, who would of course require to know, before commencing to haul the goods, whether the ship was ready to receive them on the quay, have been in the habit since this agreement was made, of requiring the consignees to sign a document stating that the goods were to be hauled at their request and agreeing to pay the charges, and of requiring the agents of the ship to countersign it, thereby indicating that they were ready to receive the goods. When that was done, arrangements would be made for the payment by the railway company of the agreed allowance of 1s. 5d. (divided as above mentioned) to the consignees of the goods, and the goods would be duly hauled.

The vendors, Messrs. Butler and Co., in order to facilitate the arrangements for the conveyance of these trench shields to the quay, entered into an agreement with Messrs. Greenhough and Esplen, Ltd. (whom I will call Messrs. Greenhough) the second defendants on the record, whereby the latter undertook to act as forwarding agents of the goods on certain agreed terms. They stipulated that the goods should be consigned to their order. Messrs. Butler, during their negotiations with the ship's agents, Messrs. Leopold Walford and Co., Limited, the third defendants (I will call them Messrs. Walford), with a view to obtaining their assurance that they were ready to receive the goods, apparently overlooked the fact that the goods were to be consigned to the order of Messrs. Greenhough, and arranged at the request of Messrs. Walford to consign them to their order. If this had been done, Messrs. Walford would, as consignees, following the course which I have mentioned, have duly received the allowance and adjusted matters with the Dock Board, and they would have made arrangements for receiving and unloading the goods. If the cost of unloading the goods from

the wagons at the quay had exceeded the 1s., they could, under this arrangement, have looked to Messrs. Butler for payment of the excess. Messrs. Walford as the proposed consignees accordingly indicated their readiness to receive the goods.

The applicants at Liverpool, being informed that Messrs. Walford were ready to receive the goods, directed their representatives at Stanningley to forward them to Liverpool consigned to Messrs. Walford, and as I have said agreed to carry them at the f. a. s. rate. The first parcel of goods was accordingly labelled to order of Messrs. Walford, "direct haulage," *i.e.*, to be hauled over the Dock Board railway. Subsequently however an unfortunate mistake was made in the consigning of the goods at Stanningley which led to serious consequences. Messrs. Butler, having remembered, or being reminded, that the goods ought to be consigned to the order of Messrs. Greenhough under their contract with them, gave directions that they were to be so consigned, and the railway company's representatives at Stanningley accordingly, without waiting to ascertain whether Messrs. Walford would still be ready to receive them although consigned to Messrs. Greenhough, and without obtaining fresh instructions from Liverpool, sent further goods forward in different parcels, consigned to Messrs. Greenhough. The officials of the railway company at Liverpool were not made aware of this change at the time, and there was a misunderstanding between the Liverpool and Stanningley officials as to what the conditions were on which the goods had been forwarded. The conduct of the officials at Stanningley in so acting was, when the complications arose which led to this litigation, described by the railway officials at Liverpool as "blundering," which it certainly was. This was the beginning of the difficulties which ultimately led to disastrous consequences, so far as expedition in completing the consignment was concerned. The goods arrived in due course at Huskisson station. The applicants, on receipt of the goods

at Huskisson station, although their duty was, under the f. a. s. contract, to arrange for the forwarding of them to the quay, took up the position that the transit was at an end and that it was for Messrs. Greenhough to make arrangements for the conveyance of the goods from Huskisson station to the quay; they accordingly, caused advice notes to be sent to Messrs. Greenhough, stating that the goods had arrived and would, after the free days had elapsed, be treated as on demurrage.

Messrs. Greenhough did not at first take exception to these notices, and took steps to see if they could arrange with the Dock Board to haul the goods. Messrs. Walford, however, took up this position; that as they were not the consignees they would not get the benefit of the arrangement as to the allowance, and they stated that, if they incurred extra cost in unloading, Messrs. Greenhough would have to defray it. This Messrs. Greenhough declined to do. This led to difficulties. Messrs. Walford refused to countersign the document tendered by the Dock Board, and the latter refused to haul the goods. Messrs. Greenhough then tried to get the goods carted, but failed except as to a very small portion. They then called on the applicants to carry out their contract and convey the goods to the quay. The applicants endeavoured to have them carted, but having found this impossible, they asserted that the transit was at an end when the goods arrived at Huskisson station. This contention was resisted by Messrs. Greenhough. A long and voluminous correspondence followed between the several parties, and between the different officers of the parties. The deadlock, for such it was, continued for several weeks. On June 3 Messrs. Greenhough to get out of the difficulty reconsigned the goods to Messrs. Butler. Messrs. Butler refused to accept any responsibility, and reconsigned them to Messrs. Walford on June 5. Ultimately, to put an end to what was an intolerable position, Messrs. Walford took steps to have the goods hauled by the Dock Board, and this was at last done, the goods arriving at the quay on June 23.

It is in these circumstances that these proceedings for demurrage of the wagons were taken. As the claim was originally made, the right to claim demurrage was put upon the ground that since the agreement of 1905 the conveyance of the goods to the ship's side had in fact always been done by the consignees, and that, as the wagons had been detained, demurrage had accrued due. This was developed by an amendment of the application, and the case was then put on three alternative grounds. (1) That there was a usage whereby the consignee under a f. a. s. contract takes delivery at the terminus of the railway company where the transit ends; the consignee making all arrangements for delivering to the ship's side. (2) That the consignor and consignee had an option to accept delivery at Huskisson and arrange for delivery at the ship's side, and had exercised it. (3) That if the applicants contracted to carry to the ship's side over the Dock Board rails, they conveyed as near thereto as possible, owing to the refusal of Messrs. Walford to allow the trucks on to the Dock quay.

In my opinion each of these contentions fails. No usage was proved in fact. The evidence fell far short of it. If it had been established in fact, it would have been bad in law, as it would have contradicted the plain terms of the written agreement for carriage. The option, which was in truth nothing more than the right which every consignee would have, to arrange to take delivery before the goods arrived at their ultimate destination, never was exercised. It is true that Messrs. Greenhough took steps to ascertain if they could get the goods carted or hauled, and they did arrange to have a few of them carted, but there was no alteration of the terms of the contract, and it is quite impossible for the applicants to contend that Messrs. Greenhough ever agreed to relieve them of the performance of the duties which they had undertaken. The third point is, in my opinion, equally untenable. If the applicants had been ready and willing to convey the goods to the quay and carry out

their contract, and if Messrs. Walford had hindered them or prevented them during the period in question from so conveying them, I think that the applicants would probably have been entitled to claim demurrage as for services rendered under Part IV. of the schedule to the order. Whether this Court would have had jurisdiction to deal with such a claim, it is unnecessary to decide. But the applicants never were ready and willing to perform their agreement. If they had been, the difficulty would no doubt have been overcome. Messrs. Walford were within their right in refusing to accept responsibility in the events that happened in respect of the unloading of the goods, and the applicants cannot set up their refusal as a ground for claiming demurrage. I think that the claim fails and must be dismissed as against all the defendants.

Mr. Holman Gregory has asked that it should be dismissed with costs as against Messrs. Butler, but we can only make that order if we are satisfied that the claim against these defendants was frivolous and vexatious, and although it was based on very slender grounds, I cannot say that it comes within this description. The claim was not confined to the two days in June, but the applicants in the alternative sought to make these defendants liable for the whole demurrage as consignors.

The judgment will be in the same form in the case of each of the three defendants.

HON. A. E. GATHORNE-HARDY: I agree.

SIR JAMES WOODHOUSE: I am of the same opinion. I think when the complicated facts of this case are unravelled, it becomes perfectly clear that the applicants failed to duly fulfil the obligation which their contract for the carriage of the goods in question involved, namely, to carry them to the ship's side and to unload them on to the quay. The detention of the railway wagons for which the applicants seek

to make the defendants liable, was not, in my opinion, due to any default of the defendants, who are accordingly entitled to judgment in their favour.

Further argument took place as to the power of the Court to award costs. Counsel for all the defendants submitted first, that in fact the claim against each of the defendants was frivolous and vexatious, and second, that whether it was so or not, the Court had power to award costs. The case had come before the Commissioners as arbitrators appointed by the Board of Trade under section 6 of the Board of Trade Arbitrations Act, 1874. That section provides that when any difference, to which a railway company is a party, is referred by the Board of Trade to the Railway Commissioners, they shall have the same powers as if the matter had been referred to their decision in pursuance of the Regulation of Railways Act, 1873, and also any further powers which the Board of Trade, or an arbitrator appointed by the Board of Trade, would have had for the purposes of the arbitration if the difference had not been referred to the Commissioners. That being so, in such a case the Commissioners had all the powers, including the power to award costs, which an arbitrator had under the Arbitration Act, 1889. Section 2 of the Railway and Canal Traffic Act, 1894, provides that in proceedings before the Railway Commissioners other than disputes between two or more companies, the Commissioners shall not have power to award costs on either side unless they are of opinion that either the claim or the defence has been frivolous and vexatious; but it was argued that that section refers only to proceedings before the Commissioners in their capacity of Commissioners, and not to proceedings before arbitrators who happen to be also Railway Commissioners.

LUSH, J.: The first question that we have to decide upon this application with regard to costs is one of general importance. The contention on behalf of each of the three

defendants is that we have full discretion over the costs and that that discretion is not restricted by section 2 of the Railway and Canal Traffic Act, 1894. The terms of the section are plain. "In proceedings before the Railway and Canal Commissioners other than disputes between two or more companies, the Commissioners shall not have power to award costs on either side unless they are of opinion that either the claim or the defence has been frivolous and vexatious." In section 19 of the Railway and Canal Traffic Act of 1888 a different provision had been made with regard to the discretion of the Commissioners over costs, because that section says: "The costs of and incidental to every proceeding before the Commissioners shall be in the discretion of the Commissioners, who may order by whom and to whom the same are to be paid, and by whom the same are to be taxed and allowed." It is said that section 19 of the Act of 1888 applies to these proceedings, and that section 2 of the Act of 1894 does not apply, and that the latter section does not alter the provisions of section 19 of the earlier Act. It seems to me clear when one looks at the language of section 2 of the Act of 1894, that that contention is not well founded. The Act itself, as appears by section 5, is to be read with the Railway and Canal Traffic Acts 1873 and 1888, and if the legislature had intended, in passing this new provision in 1894, to restrict it to a certain class of proceedings and not to make it of universal application, it would have been easy to say so. So far from doing that, the widest language is used in section 2 of the Act of 1894, and I think that it is impossible, therefore, for us to say that if this proceeding is in fact a proceeding before the Railway and Canal Commissioners, section 2 does not apply. Is it a proceeding before the Railway and Canal Commissioners? It has been argued that it is not, that the dispute having been referred to this Court by the Board of Trade, it is said that we are not setting here as Commissioners, but that we have the same jurisdiction, and only the same jurisdiction that an Arbitrator would have if the

Board of Trade had referred the dispute to an Arbitrator. There again I think it is impossible for us to accept that contention. The proceeding is before the Railway and Canal Commissioners in their capacity of a corporate Court, and I think that it does not matter in the least whether the dispute has been referred to it by the Board of Trade, or whether the proceedings come before the Commissioners in the ordinary way.

Sir James Woodhouse has drawn my attention to what was said in the House of Lords and in the Court of Appeal in the *National Telephone Co., Lim. v. Postmaster-General*.¹ It was much the same argument which was used there. There had been an agreement by the National Telephone Co. to sell to the Postmaster-General, and there had been a statute, the Telegraph Arbitration Act of 1909, providing that any such difference as that contemplated by the agreement, "Shall if the parties to such difference have before the passing of this Act agreed or hereafter agree to such reference, be referred to the Railway and Canal Commission, and that the Commission shall determine the same." The question there arose as to whether there was any right of appeal from the judgment which was given by the Railway and Canal Commissioners. It was contended that the Court had been sitting as Arbitrators and not as a Court, and consequently that there was no right of appeal; but it was held both by the Court of Appeal and the House of Lords that that was not so; that the proceedings were really before the Railway and Canal Commission, and not before arbitrators, and that consequently an appeal lay.

I think that it is clear that what was said in the telephone case applies to the present case. This Court is sitting as a Court although the dispute has been referred by the Board of Trade; consequently section 2 of the Act of 1894 applies, and therefore we have no jurisdiction in this case to order costs to be paid unless we are satisfied that the proceedings are

(1) *Ante*, Vol. XV. 109.

frivolous and vexatious. Now are they? So far as Messrs. Greenhough are concerned it seems to me quite clear that they are not. The applicants are wrong, as we have held, in their claim against Messrs. Greenhough, but it is quite impossible to say that as against them the proceedings are so obviously unsustainable as to entitle us to say that the proceedings were frivolous and vexatious. I was more impressed with regard to the case as it affected Messrs. Butler, and if the claim against Messrs. Butler had been a claim only for the two days' demurrage between the dates of the 3rd and the 5th June, I think that we might have been justified in saying that the proceedings were frivolous and vexatious. But that is not the only way in which the case was formulated against Messrs. Butler. The argument of Mr. MacKinnon has been that this service, when it was rendered, had been a service rendered to the consignors who contracted with the railway company, and that consequently it was rendered at the request and for the convenience of the consignor, although those who were responsible for the delay were the consignees and not the consignors. Again we have held that that argument is not well founded, but I am not prepared to go the length of saying that it is an argument which could not have been presented to this Court, so as to justify us in saying that it was an argument to which we ought not to listen, and I do not think that it falls within the category which is mentioned in section 2 of the Act of 1894. Lastly, with regard to Messrs. Walford, if it is impossible to say that the proceedings are frivolous as against Messrs. Butler, it is still more impossible to say that they are frivolous as against Messrs. Walford. For these reasons I think that we must say that the application is dismissed, but without costs.

Solicitors—Davenport, Cunliffe & Blake, agents for Lingards & Hamp. Manchester, for the Cheshire Lines Committee; Vincent & Vincent, agents for North & Sons, Leeds, for Messrs Butler; Walker & Tree, agents for Weightman, Pedder & Co., Liverpool, for Messrs. Greenhough; Lawrence Jones & Co., for Messrs. Walford.

BUTTERLEY CO., LIM., AND OTHERS *v.* MIDLAND RAILWAY CO., LONDON AND NORTH WESTERN RAILWAY CO., AND LANCASHIRE AND YORKSHIRE RAILWAY CO.¹

Increase of Rates—Defence under Railway and Canal Traffic Act, 1913—Affidavit of Documents—Practice.

June 8, July 24, 1916. July 13, 30, 1917.—In an application under the Railway and Canal Traffic Act, 1894, complaining of an increase of rates, the defendant railway companies raised a formal defence under the Railway and Canal Traffic Act, 1913, contending that the increase was justified on the ground that there had been a rise in the cost of working the railway resulting from improvements in the conditions of employment of their labour staff.

The applicants took out a summons asking for an order that the defendant companies should make an affidavit of documents stating what books and other documents were or had been in their possession or power relating to the matters in question in the application and showing the amounts incurred or expended by them in each of the years 1911 and 1913, and any allocations of such wages and salaries between departments, services, and branches or classes of traffic. The Registrar having refused this application, the applicants appealed and, on the hearing of the appeal, it was agreed that the defendant companies should deliver their tables of figures to the applicants, who were to have full power of inspecting all relevant books, with liberty to apply for an affidavit of documents and interrogatories. The defendants subsequently also agreed to furnish a list of those documents which they considered to be relevant.

The Midland Railway Co. delivered two lists of the documents in their possession, and twelve months later the applicants again applied for an affidavit of documents, contending that books, such as the extra wages book and the permanent way book, had inadvertently not been disclosed in the lists delivered by the railway companies.

Held, that, having in view the proviso to Rule 12 of Order 31 of the Rules of the Supreme Court, that “discovery shall not be ordered when and so far as the Court or Judge shall be of opinion that it is not necessary for disposing fairly of the cause or matter, or for saving costs,” the order for an affidavit of

(1) Before Lush, J., and Commissioners the Hon. A. E. Gathorne-Hardy and Sir James Woodhouse, sitting at the Royal Courts of Justice, London.

documents ought not to be made in the present case, and that an application for an affidavit of documents must be considered on the special facts and history of each particular case.

This was an appeal from a decision of the Registrar, refusing to make an order requiring the defendant railway companies to file an affidavit of documents. The applicants, who had a large siding-to-siding traffic in iron and iron-stone had complained, under the Railway and Canal Traffic Act, 1894, of a four per cent. increase of rates made in 1913.

The defendant railway companies had pleaded justification under the Railway and Canal Traffic Act, 1913, on the ground that there had been a rise in the cost of working the railway resulting from improvements in the conditions of employment of their labour and clerical staff. The applicants appealed, and the appeal was heard on June 8, 1916.

R. Whitehead, K.C., and *E. Clements* appeared for the applicants.

Sir J. Simon, K.C., *G. J. Talbot, K.C.*, and *C. H. G. Campbell*, for the Midland Railway Co.

G. J. Talbot, K.C., and *Bruce Thomas*, for the London and North Western Railway Co.

J. B. Aspinall, for the Lancashire and Yorkshire Railway Co.

LUSH, J.: The applicants should have the defendant companies' tables of figures delivered to them with all proper despatch, and they should have the fullest opportunity of inspection of all the books, which the railway companies will assist them to ascertain; and if they are dissatisfied after that, they have liberty to apply, not only for an affidavit, but for interrogatories, specific or otherwise.

The railway companies subsequently agreed to furnish the applicants with a list of those documents which they (the companies) considered to be relevant.

On July 13, 1917, the applicants again applied to the

Court for an affidavit of documents in the possession or power of the Midland Railway Co. In the interval since the previous hearing much correspondence had ensued, and the Midland Railway Co. had delivered, in October, 1916, a final list of documents. This list set out under general heads figures relating to seven departments—chief mechanical engineer, carriage and wagon, general superintendent, chief engineer, goods manager, police, general stores—and under each of these it set out subsidiary headings, such as “pay sheets for 1912 and 1913.” The documents prepared by or for their accountant were then set out. They then referred, *inter alia*, to (a) “statistical returns made to the Board of Trade for four weeks of 1911 and the whole of 1913, compiled from pay sheets”; (b) minute books containing board minutes which the railway company were prepared to produce; (c) Railway Clearing House minutes.

The railway company also had agreed to allow the applicants to inspect (1) the award of Sir Robert Romer, dated November 3, 1912, on rates of pay and conditions of service of certain grades; (2) records of settlements effected with other grades between August 19, 1911, and July 1, 1913. On this list, the applicants’ representatives had inspected the railway company’s documents.

R. Whitehead, K.C. (E. Clements with him), for the applicants:

Documents obviously relevant have not been disclosed to us in the defendant companies’ list, such as the “extra works” book, showing the amount of wages spent on extra works, the “permanent way” book, and the “weekly mileage” book. In addition to increased wages, it may be that the railway companies have effected economies; to ascertain this the books must be searched. It is no “fishing” expedition. The applicants want a general affidavit as to all material documents dealing with statistics and returns (leaving out correspondence).

Sir J. Simon, K.C. (G. J. Talbot, K.C., and C. H. G. Campbell with him), for the Midland Railway Co.:

The only question to be considered under the Railway and Canal Traffic Act, 1913, is what change there has been in the rate of wages, reduction of hours and any other conditions of the labour or clerical staff which can be measured in money, and whether the resulting increase justifies the increased rate. The "extra works" book shows capital expenditure, and has nothing whatever to do with the defence under the Act. The *proviso* in the Judicature Rules plainly operates.

LUSH, J.: In this case the applicants, the Butterley Company, and others, applied to this Court for an order that the defendants, the Midland Railway Co. should make an affidavit of documents. The object of the proceedings which have been taken by the applicants against the three defendant railway companies is to have it declared that an increase in the rates which the companies have made under the Railway and Canal Traffic Act, 1913, is illegal, and that the increased rates are unreasonable.

The application for an affidavit of documents, which is made at present only against the Midland Railway Co., first came before the Court in June, 1916. The documents in the possession of the company which are relevant to the important issue raised are necessarily very voluminous. They are not as voluminous as would be the case if the railway company had sought to increase their rates, or some of their rates, under the Railway and Canal Traffic Act, 1894. As was decided by this Court and the Court of Appeal in *Associated Portland Cement Manufacturers (1900), Lim. v. Great Northern Railway Co.*¹, in order to determine whether a railway company are able to justify an increase of rates under the Act of 1913 on the ground that there has been a rise in the cost of

(1) *Ante*, p. 94; [1916] 2 K. B. 262.

working the railway resulting from improvements in the conditions of employment of labour, the proper method to be employed is to compare the cost of labour in connection with the goods traffic at the time when the increase is made with that which would have prevailed under the old conditions, taking into consideration any economies that may have been effected by the improved conditions of labour. Upon this issue some of the evidence which would have been necessary, if the proceedings had been under the earlier Act, will no doubt be dispensed with. Still, the fact that the company have to prove that the increase is justified owing to the causes I have mentioned makes it necessary for the company to refer to or disclose a large mass of documents.

When the application for the affidavit of documents first came before us, it was suggested that as the documents were so numerous the parties should approach each other and endeavour to come to some agreement. They did so. The parties and their counsel and solicitors, as well as accountants, met, and, as the result of a discussion that took place, the railway company's representatives agreed to furnish a list and give inspection of what they considered to be the relevant documents. The applicants, while reserving all their rights, agreed to inspect the documents so disclosed and to state what further documents they might require to see. This was done. The documents disclosed were considered by the applicants' accountants. Fresh requisitions were made and further documents were disclosed and inspected. Unfortunately, after a long and laborious investigation had taken place, the endeavour to settle the question amicably broke down, and now, after the lapse of more than a year, the applicants come to us again and ask for what they call the ordinary order for an affidavit of documents. They do not ask to have all the correspondence disclosed. This Mr. Whitehead, on their behalf, agrees would be oppressive. But they ask to have the statement of the railway company's officials as to what relevant documents they have or have

had in their possession put upon oath, and to have the documents scheduled, either by reference to the lists already prepared or otherwise. The company resist this, and say that not only has no necessity been shown for such an order, but that the company have in fact disclosed documents which could not have been ordered to be disclosed, had the parties from the first stood upon their strict rights.

Now I quite agree with Mr. Whitehead when he says that in agreeing to take the course I have mentioned, the applicants did not lose their right to have an order for an affidavit of documents, if it became necessary. But at the same time one cannot ignore what has taken place, and the Court must, I think, see before such an order is made as is now asked for, that under all the circumstances, having regard to the negotiations that have taken place and the disclosure that has been made, it is necessary to order an affidavit to be made, in order to dispose fairly of the cause or in order to save costs. This important qualification has been placed by the Rules¹ upon the right of a litigant to an affidavit of documents, and we must consider whether it is necessary in the circumstances of this case to make the order for one or both of the purposes mentioned. Now if there was any reason to suppose that the railway company had taken advantage of the agreement that was made to keep documents back, or that they were desirous of cutting down the applicants' rights, I should not hesitate to say that an affidavit should be ordered. But the very opposite is, I think, the case. We have listened carefully to Mr. Whitehead's reasons for complaining of what the company have done, and for urging that certain classes of relevant documents have not been disclosed which would assist the applicants in showing that the rise in the cost of working the railway is not such as to justify the increase in the rates. In my opinion, he has wholly failed to justify his contention. There may be ground for saying that such

documents as the monthly and weekly returns made by the station masters to the general manager and the superintendent of the line respectively ought in strictness to have been disclosed or accounted for; one of these classes of documents appears to have been destroyed. But the same documents have been disclosed in another form, and the right that is claimed is merely a technical right. The original rough returns could not, in my opinion, assist in fairly disposing of the cause or in saving costs; and the same observation applies to the other documents, the absence of which is complained of. Some of them, for example the extra works book, do not appear to me to be relevant at all. An offer was made in the course of the hearing which in my opinion would, if it had been accepted, have given to the applicants all that they could possibly have required. It was suggested that the applicants should be at liberty to interrogate the railway company as to the specific documents which they required to have disclosed and also to administer a general interrogatory as to the completeness of the disclosure which had been made. This was suggested to meet Mr. Whitehead's contention that at present his clients had not had any statement on oath and had had to rely on the mere word of the company's officials. But this was declined. Mr. Whitehead said that his clients wished to stand on their strict legal rights. I am far from saying that an affidavit of documents should never be ordered, but each case must be considered on its special facts, and, having regard to all that has happened in this case, I do not think that in our discretion we ought to order an affidavit of documents to be made. The application must be dismissed.

An application by the Midland Railway Co. for costs was refused.

Solicitors—Thicknesse & Hull, for the applicants; Beale & Co., for the Midland Railway Co.; M. C. Tait, for the London and North Western Railway Co.; A. de C. Parmiter, for the Lancashire and Yorkshire Railway Co.

TRADERS' TRAFFIC CONFERENCE (INCORPORATED) v. MIDLAND RAILWAY CO.¹

Rates—Classification of Merchandise—Spirits of Tar—Dangerous Goods—Rates and Charges Orders Confirmation Acts, 1891-2, Schedule, Part IV.

December 11, 1917.—The applicants were an association of traders, incorporated with the object of promoting the trade, commerce, and manufactures of the United Kingdom and, *inter alia*, of defending the interests of traders in the matter of railway charges and rates. Members of the association were interested in the production and consumption of benzole, naphtha, and toluol, substances obtained by distillation from coal tar. In the classification of merchandise traffic in the schedule of the Rates and Charges Orders Confirmation Acts, 1891-2, "spirits of tar, in casks or iron drums," appears in Class 2, and the applicants contended that benzole, naphtha, and toluol were "spirits of tar" within the meaning of those words in the classification, and that therefore the railway companies could not charge rates higher than Class 2 rates for their conveyance. The applicants admitted that benzole, naphtha, and toluol were substances of a dangerous nature, and properly describable as dangerous goods.

The railway companies contended that benzole, naphtha, and toluol were not commercially known as spirits of tar, and were therefore not included in Class 2; and they further contended that even if those substances were spirits of tar within the meaning of the classification, they were also dangerous goods, and could therefore be charged for as coming within the exceptional class in Part IV. of the classification.

Held, on the facts, that benzole, naphtha, and toluol, although chemically obtained from coal, were not "spirits of tar" within the meaning of those words in Class 2, and were not included in that class, and that as they were admittedly dangerous goods, the railway companies were justified in charging for their conveyance rates applicable to dangerous goods under the exceptional class in Part IV.

Quere.—Whether, where there is a genuine description of goods in the classification under which specific goods ordinarily and commercially fall, it is competent to a railway company, if they are in fact dangerous goods, to put such specific goods into Part IV. and charge accordingly.

(1) Before Lush, J., and Commissioners the Hon. A. E. Gathorne-Hardy and Sir James Woodhouse, sitting at the Royal Courts of Justice, London.

The applicants in this case were an association of traders incorporated under the Companies Acts, 1908 and 1913. They represented a number of important industries, and their object was, *inter alia*, (i) to promote and protect by all lawful means the trade, commerce, and manufactures of the United Kingdom; and (ii) to consider all questions connected with trade, commerce, and manufactures, and particularly to investigate all matters of railway and other traffic facilities, charges, and rates for or in connection with the same and to deal with all such questions and matters in so far as the same are of general application, and not for the benefit of any individual or individuals only.

Members of the conference were engaged in the production of tar and the manufacture by distillation of various tar products, and in particular in the manufacture of benzole, solvent naphtha, and toluol. In the course of their business they became dissatisfied with the charges made by the railway companies for the conveyance of those articles, and, having failed to arrive at a settlement with the companies, they applied to the Railway Commissioners to hear and determine the matters in dispute.

The application dealt with a large number of complaints against a large number of companies, but an order was made by the Registrar that in the first instance the question of classification only should be decided, and one only of the railway companies concerned, the Midland, should be made defendants as representing the railway interest generally. The present proceedings, therefore, raised only one question, viz., what was the proper classification of the substances benzole, solvent naphtha, and toluol.

The material paragraphs of the application were as follows:

(7) The traders for the purpose of their business dispatch or receive large and small quantities of benzole, naphtha, and/or toluol with a flash-point below 73 deg. F. (Abel Close test) in lots both greater and less than three tons, and either in casks, iron drums, or in owner's tank wagons. The

traders dispatch the said goods as vendors or receive them as purchasers, or consign the same from one factory to another in cases where they own factories in different parts, over the lines of the defendants' railways, so that as vendors or purchasers or consignors, they pay to the defendants the rates of carriage complained of in this application, and are interested in the reduction or proper application of the said rates. They are further interested in the said rates in cases where they do not themselves have to pay the carriage on the said goods, inasmuch as the cost of carriage is a determining factor with possible customers in deciding whether to buy from the traders or not.

(8) In the statutory classification of goods scheduled under the Railway Rates and Charges Orders Confirmation Acts, 1891 and 1892, "spirits of tar packed in casks or iron drums," are placed in Class 2. Benzole, naphtha, and toluol, are spirits of tar, and are all "spirits of tar" within the meaning of those words in the said statutory classification. The defendants, nevertheless, claim to charge and do charge the traders for the said goods as follows—(then followed a number of detailed charges higher than the rates in Class 2). The entry "spirits of tar" appearing in those charges was added to the railway companies' special classification of dangerous goods in August, 1916.

And in the prayer the applicants applied to the Commissioners (1) to hear and determine the disputes between the applicants and the railway companies; and (2) for a declaration that benzole, naphtha, and toluol are spirits of tar, and are comprised within Class 2 of the statutory classification.

By their answer, the defendants, the Midland Railway Co., denied that benzole, naphtha, and toluol were spirits of tar within the meaning of those words in the classification of merchandise traffic scheduled to the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891, or at all. And they claimed that the said articles

were dangerous goods within the meaning of Part IV. of the schedule to the said Act, and that they, therefore, were entitled to charge in respect of them such reasonable sum as they thought fit.

R. Whitehead, K.C., Holman Gregory, K.C., and F. T. Barrington-Ward, for the applicants:

The question is, Are these three articles within Class 2 of the statutory classification, so that the applicants are entitled to have them carried at rates not exceeding the maximum for Class 2? The defendants say that they are entitled to charge higher rates because, firstly, the articles are not in fact spirits of tar, and secondly, they are in fact dangerous goods. We contend that the articles are in fact spirits of tar, and that being so, we contend that even if they are dangerous goods, as we admit they are, Parliament has placed them in Class 2, and the defendants are not entitled to charge more than the Class 2 rates for their conveyance. By placing the articles in Class 2, Parliament has decided that, whether dangerous or not, they are ordinary articles of commerce to be carried at the ordinary rates, and not exceptional articles, as to which a special arrangement must be made under Part IV. The two classifications are exclusive of one another.

The case differs from *North Eastern Railway Co. v. Reckitt & Sons, Lim.*¹, for there the articles which the railway company claimed to treat as dangerous goods were not included in the statutory classification at all.

Evidence was then called on behalf of the applicants, to prove that benzole, solvent naphtha, and toluol were spirits of tar.

G. J. Talbot, K.C., and Eustace Hills, for the defendants:

The only article which has ever been known in commerce as

spirits of tar is a distillation of wood tar, which is only used for medical and veterinary purposes; the articles the subject of this application are made from coal, and are always known by their specific names. Under section 105 of the Railway Clauses Consolidation Act, 1845, railway companies have the power, in a *bonâ fide* exercise of their discretion, to declare goods as dangerous, and goods so declared are chargeable under Part IV. of the Act of 1891. The policy of those who drew up the statutory classification was to exclude all articles which at the time were known to be dangerous. Part IV. specifies the exceptional charges mentioned in "such part and the circumstances in which they may be made"; and, therefore, if any goods mentioned in the classification are carried in circumstances dealt with by Part IV., then the Part IV. rate is the right one. If, therefore, anything in the classification is carried in such circumstances that it is dangerous, then it must be treated as dangerous goods, and paid for accordingly. In *North Eastern Railway Co. v. Reckitt & Sons, Lim.*,¹ Bankes, J., appears to have been of opinion that where an article was expressly mentioned in another part of the classification, it could not be treated as coming within Part IV., but the point was not really before him for decision, and his opinion was *obiter*.

LUSH, J.: The dispute between the applicants and the railway company arises in this way: The railway company have for many years been in the habit of carrying three products, known as benzole, naphtha (by which is understood solvent naphtha), and toluol, with a flash-point below 73 deg. F., by railway, and charging for them on the footing that they are dangerous goods, falling within Part IV. A large number of traders, who are members or constituents of the applicants' conference, have raised this objection recently

with regard to the charges or rates imposed by the railway company upon the carriage of these three kinds of goods. They say that in the classification there is this item found under Class 2: "spirits of tar, in casks or iron drums," and that the three products in question, which are all products obtained by distillation from coal tar, are spirits of tar, and that, being spirits of tar, and being described in this way, with this special description in the classification, it is not competent for the railway company, although they may be dangerous goods, to put them into Part IV. and charge more than the rates and charges authorised under Class 2. That contention, of course, raises two wholly different questions. The first is entirely a question of fact: is it true that these three products are spirits of tar within the meaning of the classification? The other question, which is really one of law, is whether, on the hypothesis that these products are spirits of tar, it is competent for the railway company, treating the spirits of tar as in fact dangerous goods, to put them for the purpose of their charges into Part IV. and charge the higher rates which are charged in respect of goods which properly come within Part IV.

To deal first with the question of fact, there seems to me to be really very little, if any, controversy between the parties with regard to it. It has been proved by the distinguished chemists who have been called for the applicants that these three products are all obtained from coal tar, I will not say invariably, but certainly generally, by a process of distillation. That fact has never been controverted, as I understand, by the railway company; on the contrary it has been admitted throughout that these three products are derived from coal tar, and that therefore in one sense they are properly described as spirits of tar. But there arises a question whether, within the true meaning of this classification, they are properly described as spirits of tar, and for that purpose one has to look not at what the view of the chemist may be, but at what is the ordinary commercial description of these three

products. The classification was not made for the purpose of being read and dealt with by chemists. It is a business classification, and one naturally looks in order to see the meaning of the terms that are used, not at what the chemical origin of these particular products may be, but at what business men would understand when one talks of spirits of tar, or what they understand when one talks of benzole, of naphtha, and of toluol. Upon the question of what the commercial meaning of this description is, the witnesses for the applicants themselves admit that they had not heard of benzole, for example, being commercially described as spirits of tar. There again the railway company take the same view, and ask us to take the same view. We have heard this view still more strongly emphasised by the witnesses called for the railway company, because we were told by one of the gentlemen who gave evidence, that when he asked for spirits of tar, wanting to obtain some, he was given not one of these products from coal tar, but a wholly different product which is a product used for medicinal or other purposes, and which comes from wood tar. That product, the carriage of which is very small compared with the carriage of these three products, is what is known commercially as spirits of tar. As I understand the evidence, if one were to go and try to obtain that commodity, one would naturally call it spirits of tar. If, on the other hand, one wanted to purchase a gallon of benzole, one would not think of going and asking for a gallon of spirits of tar; it is not known commercially as such, and it is not usually recognised or described by any such denomination as that. That being so, can one entertain any doubt as to what the true description of these three products is? I have no doubt at all that putting upon this classification and the terms used in it the meaning which one would naturally put upon it, having regard to the fact that it is a business or commercial classification, whatever may be the real chemical origin of these three products, not one of them is properly and ordinarily described as spirits of tar.

That being so, one now has to deal with the case upon this footing: that these three products are not expressly designated or mentioned in the classification under Class 2. There is a complete absence of any reference to them in Class 2, and one has to say what is the proper classification or part of the classification into which to put them. They are put into Part IV. as dangerous goods; and it is not disputed as regards the question of fact that unless we are obliged to say that they come properly under Class 2, they are properly and truly described as dangerous goods, the category for which would naturally and ordinarily be Part IV. Now, are the railway company justified in charging for them as dangerous goods under Part IV.? Upon the assumption that they are not specially designated or referred to in Class 2, it is quite clear that the railway company are entitled to deal with them as they are doing. That point was really decided in the case of *North Eastern Railway Co. v. Reckitt & Sons, Lim.*,¹ and I myself cannot feel any doubt but that that decision was correct. Indeed, once assume that articles are not specially classified, and that they are dangerous goods, I cannot see any room for the contention that the railway company have not dealt rightly with these goods in respect of the charges which they have been making for them. If it had been that these goods did fall commercially within the description of spirits of tar, there would no doubt have been a question to be argued—whether, where there is a generic description of goods in the classification and you have specific goods which ordinarily and commercially come under that generic description, it is competent to a railway company, if in truth they are dangerous goods, to put them into Part IV. and charge for them accordingly. That is a question that may well be argued. I do not say one way or the other what one's view would be with regard to it, only I must certainly not be taken as assenting to the contention of Mr. Whitehead that

upon that hypothesis the railway company would be bound to treat them as goods chargeable under Class 2. There is one passage in the judgment of Bankes, J., in *Reckitt's Case*¹, in which he says: "it is true that Parliament had the power, if it chose to exercise it, of fixing the charge to be made in respect of any particular goods even though they were dangerous goods, and this power has in some instances been exercised"; and after mentioning paraffin and spirits of tar, the learned Judge adds: "this inclusion of particular goods in the statutory classification is not inconsistent with a power in the railway companies of declaring them to be dangerous, as the classification of these goods may very well have been made upon the footing that the goods were goods which the railway companies were justified in treating as dangerous goods, but not so dangerous in fact but that they might properly be included in one or other of the specified classes."

I only desire to say that the question which I have just mentioned was not before the Court in the case of *North Eastern Railway Co. v. Reckitt & Sons, Lim.*². The question there before the Court was how should the goods be dealt with, if they are not included in the generic description contained in the classification. I only want to say that if Bankes, J., intended there to express the view that, if they had been included, there would have been no power to charge for them as dangerous goods, I must not be taken to assent to it, and I desire to express no decided opinion with regard to it.

HON. A. E. GATHORNE-HARDY: I entirely agree with the judgment which has just been given, and have nothing to add.

SIR JAMES WOODHOUSE: I am of the same opinion. I am satisfied on the evidence that the articles under discussion—

(1) *Ante*, Vol. XV., at p. 144.

(2) *Ante*, Vol. XV., 137.

namely, benzole, naphtha, and toluol—would not come, according to the proper interpretation of this classification, within the description of spirits of tar in Class 2. They are admitted to be dangerous goods in fact, and they fall, therefore, in my opinion, properly within Part IV. of the classification, under which the railway company are entitled to make a reasonable charge for the carriage of the goods. Speaking for myself, looking at the description in the statutory classification, I think that it was not intended to include dangerous articles in the several classes for which the specific maximum charges are fixed. This is apparent from the reference to articles which may be of a dangerous nature, such as chemicals and oils, which are only included therein when they are of a nature "not dangerous." I incline, therefore, to the opinion that it was the intention of the framers of the statutory order to exempt dangerous articles from specific mention in the various classifications and to treat them as being chargeable only under Part IV.

Solicitors—Wedlake, Letts & Birds, for the applicants; Beale & Co., for the Midland Railway Co.

STEWARTS & LLOYDS, LIM., *v.* LONDON AND NORTH WESTERN RAILWAY CO., GREAT WESTERN RAILWAY CO., AND MIDLAND RAILWAY CO.¹

Increase of Rates—Railway Rates and Charges Orders Confirmation Acts, 1891 and 1892—Classification of Traffic—Traffic Consigned to Railway Company Inadvertently Treated as Class B—Power to Transfer to Class 2—Railway and Canal Traffic Act, 1894, s. 1—Railway and Canal Traffic Act, 1888, s. 33 (6).

(1) Before Lush, J., and Commissioner Lord Terrington and Mr. E. Tindal Atkinson, K.C., sitting at the Royal Courts of Justice, London.

May 7. July 22, 1919.—The applicants consigned traffic to the defendants as “tubes,” and the defendants accepted it as such for about thirty-four years before 1912, charging a Class C rate thereon. The defendants subsequently discovered that a small portion of the traffic in fact consisted of tubes with sealed ends which should have been consigned as “reservoirs,” and which were chargeable in Class 2. They thereupon intimated that a Class 2 rate would in future be charged on that portion of the traffic.

Held, the defendants, having acted inadvertently in accepting the traffic in question under Class C, were not increasing the rate by correcting their mistake.

Per Lush, J.: The length of time during which a mistaken charge continues to be made by a railway company cannot alter the nature of the act, but may raise a presumption of “knowledge” on their part, and place the *onus* on them of proving the contrary.

Where a railway company have, with knowledge of the facts, charged a lower rate than the appropriate one for a long period, the *onus* lies on the applicant to prove, either expressly or by implication, a contract with a particular trader, or a notification to all traders that they will carry at the lower rate; of which proof knowledge on the part of responsible officials in a position to bind the railway company is an essential part.

This was an application under section 1 of the Railway and Canal Traffic Act, 1894, complaining of an increase of rates.

The applicants were makers of iron and steel tubes which were used for the storage of compressed air for railway brake work. They alleged in their application that such tubes had for some thirty-four years, up to the year 1912, been consigned for conveyance by the defendants’ railways as “tubes and fittings for tubes” under Class C in the schedule to the Railway Rates and Charges Orders, 1891 and 1892, and the General Railway Classification of Goods, and had been accepted by the defendants as such, but that in or about May, 1912, the defendants had increased the rate on this traffic by charging it at the rates applicable to “gas tanks or holders,” which come under Class 2 of the General Railway Classification. It was further alleged in the application that no notice of such increase was given by the defendants as required by sub-section 6 of section 33 of the Railway and Canal Traffic Act, 1888, and that such increase was therefore illegal. The

applicants further stated that such increase was unreasonable. The defendant companies in their reply denied that any increase in rates had been made. They stated that prior to 1912 the traffic consigned to them by the applicants had been inadvertently treated as "tubes," whereas in reality it consisted of tanks, or holders, or cylinders, or reservoirs. It had been so treated because it had been declared as "tubes" by the applicants; and as soon as the defendants discovered their mistake they rectified it by charging the rate which, under their orders, they were entitled to charge for such holders or reservoirs. It was this rectification which the applicants objected to as an increased rate. Had the goods been properly described they would never have been charged under Class C at all, but would have been charged Class 3 rates as articles not specified in the classification; or Class 2 rates as gas-holders or tanks. The defendants denied that they had ever approved the applicants' declaration of the traffic as "tubes," or that they were cognizant of the real nature of the traffic. The defendants counter-claimed for the sums which the applicants had refused to pay on account of the alleged increase in rates. The figures were agreed between the parties in the applicants' reply.

R. Whitehead, K.C., and E. Clements, for the applicants:

The applicants supply tubes for various different purposes, sometimes with closed ends and sometimes without, and it is admitted that the orders for tubes with closed ends are sometimes given as reservoirs. But this does not affect the fact that the articles are tubes with various fittings attached. From 1878 or thereabouts until 1911 the same goods in differing sizes have been consigned by the applicants and accepted by the defendants as "tubes." In 1912 the defendants had taken up for the first time the position that these goods must be consigned as something other than tubes, and charged a higher rate. In effect this is to increase the rate

on the articles in question, within the meaning of the Railway and Canal Traffic Act, 1894. The actual increase is 40 per cent., and this cannot be called reasonable. In interpreting the word "tubes" regard should be had to the meaning attached to it when the classification was made in 1891, and it is clear that the railway companies who were parties to the enquiry which settled that classification were fully aware that these articles which are now in question were known as "tubes." The case of *Beesley & Co., Lim. v. Midland Railway Co.*¹ decides that where the railway company knew the nature of the traffic and accepted it at a particular rate they are not entitled subsequently to say they had classified it wrongly and charge a higher rate.

LUSH, J.: The first question to decide is whether the articles in question are tubes or not. If they are, no further question need arise.

Evidence was then given on behalf of the applicants, after which the Court intimated that they were of opinion that the articles in question were not tubes, but were unclassified articles.

Sir J. Simon, K.C., Sir Lynden Macassey, K.C., and Eustace Hills, K.C., for the defendants:

The onus is on the defendants to show that they have not accepted these goods as tubes knowing their nature, since they have been accepted by them for the last thirty-five years. The defendants in fact never consented to accept the traffic as "tubes," from the moment they ascertained its real character. If it is decided that the defendants are bound to continue to accept this traffic at the rate applicable to "tubes," then the position will be that the applicants will be in a more favourable position than other firms who are

sending "reservoirs" over the defendants' lines, and a serious position will arise. It may also happen that one of the defendants, the Great Western Railway Co., will be entitled to charge the applicants more than the other defendants for the same traffic, because they (the Great Western Co.) discovered their mistake very shortly after the traffic was first consigned to them, and consequently cannot be supposed to have acquiesced in the misdescription. The defendants are not seeking to raise the rate for tubes, but simply to correct a mistake of which the applicants have had the benefit for many years. The Court is not asked to classify the articles, and the defendants would be entitled to charge Class 3 rates, but as a fact they only charge Class 2, treating the traffic as "reservoirs."

The case of *Beesley & Co., Lim. v. Midland Railway Co.*¹ is distinguishable because the Court held there that with knowledge of what the traffic was the railway company had charged Class C rates and subsequently endeavoured to put the traffic into another classification. In *Ward v. Midland Railway Co.*² it was argued that the Court should infer from a long course of business that there was some implied agreement that a railway company would always abide by a misdescription of goods, but the Court did not agree with that argument.

LUSH, J: Two questions have arisen for our decision in this case: one we have already decided during the hearing, the other remains for decision now.

The facts, which can be very briefly stated, are as follows: The applicants are manufacturers, in a large way of business, of iron and steel tubes and other articles. They have, for many years, also manufactured cylinders or "reservoirs," as they are called, which are made from tubes, strongly

(1) *Ante*, Vol. XV., 306.

(2) *Ante*, p. 178; [1917] 2 K. B. 278; 86 L. J. (K. B.) 752.

welded and closed at both ends. They are used, among other purposes, for storing compressed air. The applicants have supplied these reservoirs to railway companies and other purchasers. They are always invoiced and sold as "reservoirs." For a long period—thirty years or more—the applicants have consigned these reservoirs by railway, but have consigned them under the description of "tubes," and the railway companies, treating them as tubes, until recently carried them at Class C rates. The entry in the classification for tubes is: "Tubes and fittings for tubes, except electro-coppered or coated with brass," Class C.

In 1911, the Great Western Railway Co., who had only received one or two consignments of these goods for carriage, discovered that they were not tubes, open at both ends, but "reservoirs." After investigation, that company and the other defendant companies refused to carry them as tubes at Class C rates, and insisted that the rate which was applicable was either Class 2, which applies to "gas tanks," or Class 3, which applies to unclassified articles. They were willing to treat them as "gas tanks," and charged Class 2 rates accordingly. The applicants refused to pay more than the Class C rate, and in their accounts deducted the difference. They ultimately commenced these proceedings in 1915, alleging that the articles are "tubes" within the meaning of the railway classification, and that the railway companies, having knowingly carried them during so long a period, and now claiming to be paid a higher rate, have increased their rates or charges, and that such increase is illegal (as no notices have been published) and also unreasonable. The railway companies, on the other hand, contend that the articles are not tubes, and that they are entitled to charge the higher rate, and that the lower, Class C, rate having been charged by them inadvertently, and in ignorance as to the true character of the goods, there has been no increase of a rate or charge. We have already held that the articles are not tubes, but "reservoirs," by which description, as I

have said, they were always invoiced and sold, and that Class C is not applicable to them. We have now to deal with the applicants' contention that the railway companies have increased their rates or charges, and that such increase is illegal and unreasonable.

Now, the applicants, as I have said, allege that the railway companies have knowingly carried the reservoirs as tubes. They say in their application that they were so carried "with the approval of the companies," and that the companies charged the Class C rate "well knowing the nature of the traffic." The companies pleaded that they had no such knowledge, that the goods were wrongly described by the applicants, and that the lower rate was charged by inadvertence. On this question of fact, I feel no doubt that the contention of the applicants fails. They altogether failed to prove knowledge on the part of the railway companies, and the latter established, quite clearly, I think, that they had no ground for supposing, and had no knowledge, in fact, that the goods had been misdescribed. The quantity of reservoirs consigned and carried by the companies is trifling compared to the quantity of tubes. The proportion they bear is not substantially more, I think, than 1 per cent. It would be very easy to mistake a "reservoir" for a tube. It may be that a clerk or servant engaged in handling the traffic might have noticed that some were welded, and were not open at both ends, but to prove "approval" and "knowledge" it must be shown that some responsible official of the company knew and approved. The clerk or servant would have no authority to assent to a lower rate being charged than that which was properly chargeable. No inference could be drawn against the company as to their willingness to accept a too low rate from the knowledge of an irresponsible servant. So far as the companies are concerned, I am satisfied that what was done was done inadvertently.

But, at the hearing before us, Mr. Whitehead went further, and contended that, even if the company did not "know," yet

as the lower rate had been charged for so long a period, and some servants of the company must have known what they were, the companies could not charge the higher rate without increasing their rate or charge, and that such increase was unreasonable within section 1 of the Railway and Canal Traffic Act, 1894. He did not press the contention which at one time he had raised, that it was also illegal under section 33, sub-section 6 of the earlier Act of 1888.

In my opinion this contention wholly fails. There has been no increase of a rate or charge at all. The respondents have charged no more for tubes than they did before. Nor have they claimed to charge more for reservoirs or tanks. They only claim to rectify a mistake, really caused by the error of the applicants in calling what was a reservoir a "tube." That is not "increasing" a "rate or charge." They found out for the first time in 1911 or 1912 what it was that they were asked to carry, and then for the first time charged the appropriate rates. The length of time during which the mistake continued cannot alter the nature of their act. If they made the mistake on one occasion, and rectified it on the second occasion, they would be "increasing" the rate, no more and no less, than if they made it a score of time or hundreds of times. The length of time is important in this way: it may well raise a presumption against the carrying companies that they knew what they were doing, and may place upon the companies an onus which would otherwise be on the applicants. I think that, having regard to the length of time during which the lower rate was charged, Sir John Simon was quite right in accepting the onus here. But for that, the initial burden of proof would have been on the applicants.

There is, I think, a misconception underlying the applicants' contention that a railway company are not entitled to rectify a mistake of this nature after it has continued for a long period. The reason why they may not be entitled to charge the higher rate, although it may be the appropriate

rate to charge, if they have, with knowledge of all the facts, charged a lower and different rate, without justifying the increase, is that it may be a proper inference to draw that they either contracted with a particular trader to carry goods of that nature and treat them as falling within a particular class in the classification, or that they held themselves out to traders generally as placing them in that class. A contract with a particular trader or a notification to all traders may be proved expressly or by implication. But it must be proved that they have done either one or the other, and it is for the applicants to prove it. And knowledge on the part of responsible officials who are in a position to bind the company is an essential part of the proof. It cannot be suggested that there was any estoppel which precluded the companies from proving the true facts. There was no representation by the companies on which the applicants were intended to act and did act. The incorrect representation as to the nature of the goods was by the applicants. It was made in good faith, no doubt—*mala fides* was not suggested—but it was none the less an inaccurate or wrong representation. Moreover, there can be no estoppel if the true facts are not disclosed—see *Doey v. London and North Western Railway Co.*¹

One or two cases have been cited which I must refer to. The first was *Beesley & Co., Lim. v. Midland Railway Co.*² There, knowledge on the part of the company was proved, so it does not assist the applicants. The next two cases, in the order in which they were cited, are *Beeston Foundry Co. v. Midland Railway Co.*³ and an unreported case of *White, Tomkins and Courage v. London and North Western Railway Co.*, of which we have been furnished with a transcript of the shorthand notes. No actual judgment was delivered in the latter of these two cases, and it is

(1) [1919] 1 K. B. 623.

(2) *Ante*, Vol. XV., 306.

(3) *Ante*, Vol. XIV., 119.

difficult to gather precisely whether knowledge was proved or assumed, or not. It seems to me that knowledge was assumed in the former case, the *Beeston Foundry Case*. The facts were different from those in this case, and the point as to knowledge does not seem to have been really pressed. The last case is *Ward v. Midland Railway Co.*, where knowledge was treated as an essential factor in the case. These authorities seem to me to lay down the same principle as that which I have stated. If *Beeston Foundry Co. v. Midland Railway Co.* and the unreported case of *White, Tomkins and Courage v. London and North Western Railway Co.* lay down a different principle, then they are inconsistent with the other two cases I have mentioned, and I do not think that we ought to follow them.

The application, therefore, in my opinion, fails, and the respondents must have judgment entered for them on the claim and on the counter-claim, the amount due on the counter-claim to be ascertained in case of difference in the usual way.

LORD TERRINGTON: I agree.

MR. TINDAL ATKINSON: I also agree.

Solicitors—Neish, Howell & Haldane, for the applicants; Beale & Co., for the defendants.

NORTH BRITISH RAILWAY CO. v. CLYDE
SHIPPING CO., LIM.

CALEDONIAN RAILWAY CO. v. CLYDE
SHIPPING CO., LIM.¹

Demurrage of Wagons—Shipping Company Acting as Forwarding Agent—Definition of “Trader” in the Railway Rates and Charges Orders, 1891-1892.

May 28. June 26, 1918.—The applicants were entitled under s. 5 (4) of their Rates and Charges Orders, 1892, to charge a reasonable sum in addition to the tonnage rate for the following services rendered to a trader at his request or for his convenience: “The detention of trucks or the use or occupation of any accommodation before or after conveyance beyond such time as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof; or the consignor or consignee to give or take delivery thereof; or in cases in which the merchandise is consigned to an address other than the terminal station, beyond a reasonable period from the time when notice has been delivered at such an address that the merchandise has arrived at the terminal station for delivery. And services rendered in connection with such use and occupation.”

Traffic consigned either to the defendants or to one of their steamers was conveyed in the railway companies’ wagons to their goods stations at Glasgow, where it remained until instructions were received from the defendants as to the berth in the docks to which the wagons were to be sent. The defendants were advised by the applicants of the arrival of the wagons at the stations, and in every case received the traffic. Upon a claim for demurrage for detention of wagons under the above circumstances calculated from the expiration of four free days after the receipt of the notice of arrival:

Held, that the defendants, being the actual persons who received merchandise by the railway, were traders within the meaning of the section, and the purpose for which the goods were received was immaterial. *Held*, further, that since the goods could not be delivered to the defendants at their ultimate destination until the defendants provided a berth for them, that the detention on the applicants’ lines was for the defendants’ convenience.

(1) Before Lord Mackenzie and Commissioners the Hon. A. E. Gathorne-Hardy and Lord Terrington, sitting at the Parliament House, Edinburgh.

These were differences between the North British and Caledonian Railway Companies and the Clyde Shipping Co., under section 5 of the schedules to the railway companies Rates and Charges Orders Confirmation Act, 1892, which had been referred to the Railway Commissioners by the Board of Trade.

The railway companies claimed demurrage charges for the alleged detention by the defendants of wagons and sheets after conveyance. The charges were calculated at the rate of 1s. 6d. per wagon and 3d. per sheet for each day or part of a day after the expiration of four days after arrival.

The application of the North British Railway Co. stated that between 2nd September, 1910, and 8th April, 1916, there were consigned in the wagons of the applicants, by various senders, to the defendants for shipment on the steamers of the defendants, slag for Rothesay Dock, and certain merchandise for Springfield Quay. The defendants were allowed by the railway company four free days for the unloading of the said wagons after the arrival of the wagons and merchandise. The defendants, for their own convenience, detained certain of the said wagons and certain sheets beyond the said free time. They unduly delayed giving to the railway company instructions to place certain of the said wagons alongside the vessel for shipment of the traffic in the wagons. They from time to time explained their failure to the railway company to unload the wagons within the said free time, giving such reasons as, for example, that an expected steamer had been delayed by bad weather, or that, either because no berth was available or for some other reason, no steamer was ready to take the merchandise on board, or that the steamer sailing at the time was unable to take the merchandise or part of it.

The application of the Caledonian Railway Co. contained a similar paragraph to the effect that the railway company's wagons were detained at their General Terminus Station,

Glasgow, pending the receipt of instructions from the defendants.

The defendants, in their answer, contended that they were not traders within the meaning of the Rates and Charges Order Confirmation Act of 1892, being neither consignors nor consignees of the goods in question. They further stated that they were simply intermediate carriers of the goods, and handled them on their way from consignor to consignee as ordered by the owners of the goods, and that they dealt with the goods in no other way. The answer stated in addition, that the wagons were not detained by or on behalf of the defendants, and no claim was liable to be made on the defendants for demurrage before the goods had been finally delivered to the owners. Any services rendered by the railway company in respect of detention of wagons was rendered to the consignors or consignees of the goods, and not to the defendants.

It was shown in evidence that the traffic was addressed in a few cases to the Clyde Shipping Co., General Terminus, or to the Clyde Shipping Co., Springfield Quay, for shipment, or to the Clyde Shipping Co. (General Terminus being the station of the Caledonian Railway Co. adjoining the docks). But in the great majority of cases the addresses showed that the goods were intended for one of the defendants' steamers. In certain cases where the word "Consignees" had been entered in a column on the consignment note headed "Who pays the carriage," the carriage was paid by the defendants.

The Lord Advocate (Clyde, K.C.), and T. A. Gentles, for the applicants, the North British Railway Co. and the Caledonian Railway Co.:

The defendants are "traders" within the meaning of the Act. The definition is "any person receiving merchandise by the railway." It is quite immaterial for what purpose merchandise is received, or whether he is the

owner of the goods or not, if he in point of fact is the person who receives them. There is no doubt that the defendants receive the merchandise. So far as the applicants are concerned, the goods must be handed to someone when the transit is concluded, and the person who receives them from the railway company is a trader within the meaning of the Act. The railway company have to act on the instructions given by the consignors as to whom they should hand over the goods. If the goods had not been kept in the wagons the defendants would have had to find room in sheds in the docks for them, since conveyance was complete when the goods were at the terminal station.

Moncrieff, K.C., and W. T. Watson, for the Clyde Shipping Co.:

It is clear that, apart from the statute, the defendants are not traders in the ordinary sense of the term. A trader implies a different relation to the goods than merely forwarding them. The defendants have no control over the date of despatch in many instances, and are unable to take delivery. It is conceded that where goods are the subject of a through contract, the shipping company who take the goods from a railway and simply pass them on, do not fall within the definition. The transit is not at an end when the goods are handed over by the railway company. The defendants are intermediate handlers who pass the goods on to the persons who will eventually receive them.

Further, a trader is only liable for these charges if they are incurred for his convenience, or at his request. No request was made by the defendants for the goods to be kept. They were informed of the arrival of the goods, and as soon as might be they gave delivery instructions. Until those instructions were received by the railway company, they had a duty to the consignor to hold the goods.

LORD MACKENZIE: The claim by the railway companies in these two applications is one of demurrage for detention

after conveyance of wagons consigned to the respondents, who are a shipping company.

The warrant for the charge is, in each case, the section in the Railway Rates and Charges Order Confirmation Acts, which entitles the railway company to charge, in addition to the tonnage rate, "a reasonable sum for services rendered to a trader at his request or for his convenience," including detention of trucks before or after conveyance, beyond such period as shall be reasonably necessary for enabling the consignee to take delivery of the merchandise. The scale of charges in the accounts produced is in accordance with the table published by the applicants, which are those previously fixed by this Court in the *Coltness Case*.¹ The defence is in both cases the same:—(1) that the respondents are not traders, and (2) that, even if they are held to be traders, the services were not rendered at their request or for their convenience. The rest of the defence deals with special points common to both applications. As regards the particular traffics which form the subject of these applications, it is admitted that they were going beyond the port to which they were addressed.

The term "trader" is defined for the purposes of the Rates and Charges Order Confirmation Acts as including "any person sending or receiving merchandise by the railway." The respondents, in all the cases charged in the accounts, were the consignees of the goods, as is shown by the terms of the consignment notes produced, which are in similar terms in each case. In the North British Railway case the consignment note bears—"The North British Company will please receive the undermentioned goods, and forward them, subject to the conditions on the back hereof," and then there is the signature of the sender or his representative. None of the items entered in the accounts raises the question

(1) *North British Railway Co. v. Coltness Iron Co.*, *ante*, Vol. XIV., 246.

of the respondents' liability for demurrage where the goods are consigned under a through bill of lading.

The North British case may be taken as illustrative of the question involved. The first account is headed Yoker Station, the dock is the Rothesay Dock, on the north side of the Clyde. The description of the traffic is throughout entered as slag. The account runs from September 1910 to November 1913. The amount is £33 9s. The second account is headed General Terminus Station Account, the traffic to which is for the most part for shipment at Springfield Dock, on the south side of the Clyde. The traffic varies, and includes general goods, iron, bolts, nuts, pipes, bricks, oil, barley, potatoes, &c. The description of the consignees varies to a certain extent. In the Yoker account 183 wagons are claimed for, and the terms of the entries under the columns headed "Consignee" and "Destination" are as follows:—

With regard to 38 consignments (85 wagons)—"Clyde Shipping Company, Rothesay Dock";

With regard to 45 consignments (88 wagons)—"Clyde Shipping Company's Steamer, Rothesay Dock"; and

With regard to 4 consignments (10 wagons)—"Clyde Shipping Company's Antwerp Steamer, Rothesay Dock."

In the General Terminus account the total number of wagons claimed for is 262 in 145 consignments. The terms of the entries as to "Consignee" and "Destination" are as follows:—

With regard to 66 consignments (105 wagons)—"Clyde Shipping Company, Springfield Quay (or Plantation Quay), General Terminus."

With regard to 53 consignments (83 wagons)—"Clyde Shipping Company, 'Cork Steamer,' or 'Plymouth Steamer,' &c., Glasgow."

With regard to 53 consignments (83 wagons)—"Clyde

Shipping Company, Springfield Quay, 'For Cork' General Terminus. 'For Waterford.' "

The consignments are forwarded by different senders, which, it is explained in the evidence, accounts for the difference in the description of the destination. In every case it is the Clyde Shipping Co. who receive the traffic. They both own boats and act as agents for other boats. All the traffic is dealt with in the same way. The railway company are first brought into direct relations with the shipping company when the goods arrive at the station. The information in the consignment notes is supplied by the senders, and the railway company have no more knowledge of the real interest in the goods than they get from the traffic consignment notes. When the goods arrive at Yoker or General Terminus Station the North British Railway Co. advise the Clyde Shipping Co. in writing, and sometimes also by telephone or messenger. This is done immediately the wagon has arrived at the station, and demurrage is calculated from the expiry of four free days thereafter. It is generally the practice of senders to advise the Clyde Shipping Co. of despatch, but they do not always do so. In certain cases the Clyde Shipping Co. receive no notice of despatch until they receive the advice note from the railway company. The consignees do not give a receipt to the railway company. At Springfield Quay the Clyde Shipping Co. have a large staff. At Rothesay Dock there is no permanent official staff, but the shipping company send some one down when there is loading to be done there. On receipt of the advice note the Clyde Shipping Co. do not make any reply until they are ready to deal with the goods. They approach the Clyde Trust, who own the docks, and give particulars of the traffic which they wish loaded into a certain steamer. The railway company have nothing to do with finding a berth for the steamer. The Clyde Trust hand to the North British Railway what they call an opening order, and advise them of the berth and the

crane. The railway company then send the wagon down over the dock lines from the station, and hand the goods over to the Clyde Shipping Co. Any handling that is required to get the goods loaded into the vessel is done by the shipping company's men. The rates charged by the railway company are the rates for conveyance to the port only. The rates for carriage are not paid by the Clyde Shipping Co. but by Whitson & Co., whose position is not clearly defined in the proof. They are supposed to be agents in some way. What is established by the evidence is that they have nothing to do with the traffic at the station so far as the receiving of it is concerned.

Upon these facts I am clearly of opinion that the Clyde Shipping Co. fall within the definition above quoted, and that they are traders because they are persons who receive merchandise by the railway. The contention of the respondents is that they are not persons who receive merchandise by railway, because the purpose for which they receive it is to carry it somewhere else. In the case of the slag at Rothesay Dock, it was handled by them as agents for the Cork Steamship Co., Lim., and they were paid by commission. The traffic at Springfield Dock was handled by them as shipowners. The railway company, however, upon these consignment notes, are in no way concerned with the ultimate destination of the traffic. The term "trader" is not used in the popular sense in the statute. Any private individual, as well as any trading concern, to whom merchandise is consigned by rail, and who, in virtue of his right to receive, takes delivery, thereby becomes liable in demurrage for any detention of the railway wagon, provided he has received due notice of arrival, and provided the wagon has been detained at his request or for his convenience. The merchandise may be for the private use of the consignee, or for re-sale, or may be received, as in the case of the respondents, in order merely to be forwarded. If the goods are consigned in terms similar to those con-

tained in the consignment notes in the present cases, the consignee is a trader.

It was argued, however, that even if the respondents are traders, the trucks were not detained at their request or for their convenience. The point sought to be made is that the wagons are detained, not in the dock sidings, their ultimate destination, but in the railway stations, some little distance short of these. The proof shows that it would be impossible to send down the wagons to the docks until the order opening the traffic had been received by the railway company. There is no accumulation of sidings at the docks. It was because of the delay in getting a berth, for which, in a question with the railway company, the consignee was responsible, that the wagon had to be detained at the station. This was for the convenience of the consignee. The question of who is liable under the contract of carriage for payment of the tonnage rate and station terminals is something separate. Those charges are inevitable. As regards service terminals, payment can only be avoided if special notice is given. The charge for detention of wagons is only incurred owing to the action or inaction of the consignee. He is therefore liable, and this independently of the question whether there may not be liability on the part of the consignor also. The *Polquhain Case*,¹ is an instance of the consignor being held liable for demurrage after conveyance, in consequence of the special terms of the contract. It was argued that the convenience of the consignee can only require to be consulted when, the transit having been completed, he is faced with the obligation of taking delivery. But the case of the wagon having to pass over a short distance of dock rails after leaving the lines of the railway company is provided for by the latter part of section 5 (iv.) of the Rates and Charges Orders, which deals with the detention of trucks "in cases in which the

merchandise is consigned to an address other than the terminal station, beyond a reasonable period from the time when notice has been delivered at such address that the merchandise has arrived at the terminal station for delivery.” The traffic here was in every case consigned to an address other than the terminal station, and notice was delivered at the address that the goods had arrived at the terminal station. After the expiry of the reasonable period as fixed, the goods were being warehoused in the railway company’s wagons. This was for the convenience of the person who was entitled, and had the corresponding duty, to receive, *i.e.* the consignee. Upon the question raised as to allowing the shipping company here a greater number of days than is reckoned in making up the accounts, I do not see sufficient grounds for doing so. The fair time for taking delivery at a port was fixed by the Commissioners at four days in consequence of the special considerations attaching to such traffic. Various grounds were brought forward as special reasons for excluding some of the items charged, but in the absence of proof of special circumstances, these must be left to be dealt with by the registrar. It is obvious, and was conceded, that the railway company are not entitled to charge demurrage for detention which is due to their own fault, or to their failure to give due notice of arrival. The respondents will have the right to found any argument that may be open to them upon the Act 5 & 6 Geo 5. c. 37,¹ s. 1 (2) as regards restriction on sailings due to the action of the Admiralty. Apart from these the grounds put forward by the respondents do not appear to me to provide an answer to the applicants’ claim. It is the duty of the railway company to render their demurrage accounts in a distinct shape and within reasonable time. These duties appear to have been discharged in the present case. Any argument attempted to be founded upon what passed at a meeting

(1) Defence of the Realm (Amendment) No. 2 Act, 1915.

on February 5, 1909, between representatives of Scottish railway companies and shipowners fails upon the proof.

The position of the Caledonian Railway Co. upon all the questions is similar to that of the North British.

The differences which have arisen between the parties ought, therefore, in my opinion, to be determined in the manner above stated.

HON. A. E. GATHORNE-HARDY: I concur in the opinion of Lord Mackenzie.

LORD TERRINGTON: I have had the advantage of reading the judgment of Lord Mackenzie. I entirely concur in his opinion and have nothing to add.

Solicitors—James Watson, Edinburgh, for the North British Railway Co.; D. L. Forgan, Glasgow, for the Caledonian Railway Co.; Webster, Will & Co., Edinburgh, agents for Wright, Johnston & Mackenzie, Glasgow, for the Clyde Shipping Co.

MIDLAND RAILWAY CO. v. STONES BROTHERS
AND JACKSON AND OTHERS (*et c contra*).

GREAT NORTHERN RAILWAY CO. v. BEESON
AND OTHERS.

E. J. COLEMAN & SONS AND OTHERS *v.*
GREAT NORTHERN RAILWAY CO.¹

Demurrage of Wagons—Increase of Rate—Reasonable Time to Take Delivery—Publication of Increase of Rate—Railway and Canal Traffic Act, 1888, s. 33 (6)—Rates and Charges Orders, 1891-2, s. 5 (4)—Railway and Canal Traffic Act, 1894, s. 1.

(1) Before Lush, J., and Commissioners the Hon. A. E. Gathorne-Hardy and Lord Terrington, sitting at the Royal Courts of Justice, London.

July 9, 10. November 11, 1918.—The applicant railway companies having given notice to the defendants, who were potato merchants and tenants of warehouses and private sidings belonging to the above companies at certain of their London stations that on and after January 1, 1913, a charge of 1s. 6d. per wagon per day and 3d. per sheet per day would be made after the expiration of two days, exclusive of the day of arrival, in respect of wagons and sheets belonging to the above companies, and which were alleged to be detained by reason of the defendants being unable to take delivery of the same in their private sidings, the defendants refused to pay the said charges. The railway companies thereupon applied to the Court as arbitrators appointed by the Board of Trade for a declaration that the same were reasonable. The free periods previously allowed had been in one case twenty-one days and in the other case practically unlimited, and the defendants, by cross-application, claimed that the action of the railway companies constituted an unreasonable increase of rates :

Held, that the provisions of section 1 of the Railway and Canal Traffic Act, 1894, with respect to increase of rates, relate only to charges made by a railway company as carriers and for ancillary services, and have no application to the length of time during which a wagon may be detained by a consignee, and therefore that there had been no increase of rates within the above section, but that, on the facts, the free period should be extended to four days.

The rates required by the Traffic Acts to be published in rate books, and of which notice of increase must be given, are those for the carriage of traffic and not the charges made for the detention and use of wagons after conveyance.

These were separate applications by the Midland and Great Northern Railway Companies to the Court, sitting as arbitrators appointed by the Board of Trade, to determine certain differences between those companies and the defendants in reference to certain charges for the detention of wagons which the railway companies claimed to be entitled to make under section 5 (iv.) of the schedule to their respective Rates and Charges Orders, 1891, and for declarations that the amounts claimed were reasonable. There were cross-applications by the defendants claiming that the proposed scale of charges constituted an unreasonable increase of rates, and that the railway companies had not given the statutory

notice of such increase as required by sub-section 6 of section 33 of the Railway and Canal Traffic Act, 1888.

The facts are fully stated in the judgment of Lord Terington, and may be briefly summarised here.

In the case of the Midland Co., the defendants were potato and vegetable merchants occupying warehouses belonging to the railway company at their Somerstown Goods Station in London. Each warehouse had a platform abutting on a siding. Wagons containing potatoes consigned to one or other of the several defendants were conveyed to Somerstown; on the arrival of a wagon an advice-note was sent to the consignee by the railway company. The wagon was then lowered to the low-level goods yard and kept in "wait order" sidings until the trader gave notice that he was ready to receive it, when it was brought into the siding adjoining his warehouse. Prior to the year 1913 a free period of twenty-one days was allowed for the Midland Company's wagons; in the case of wagons belonging to other companies fourteen days originally had been allowed, but this had been reduced to six days. In December, 1912, the railway company gave notice that a charge of 1s. 6d. per day would be made for each wagon detained on account of the inability of the trader to receive it after the expiration of two days, exclusive of the day of arrival. The two days were, in fact, increased to four up to September 1, 1916, when the free period was reduced to two.

In the case of the Great Northern Co., the facts were analogous. Prior to 1913 no demurrage charge had been made in respect of the company's own wagons, but it appeared that some charge had been made in respect of "foreign" wagons—that is, those owned by other companies.

R. Whitehead, K.C., E. Clements, and J. A. R. Cairns,
for the traders:

The free periods formerly allowed were part of the contract of carriage between the railway companies and the traders.

The withdrawal of this facility amounts to an indirect increase of rate in the same way as if the service of collection was no longer performed in the case of a collected and delivery rate.

F. D. MacKinnon, K.C., Douglas Hogg, K.C., and Bruce Thomas appeared for the railway companies.

LUSH, J.: These two cases raise substantially the same issues. The facts are so fully stated in the judgment of Lord Terrington that I do not propose to set them out.

There is, in my opinion, only one question which raises any real difficulty, namely, what in all the circumstances is a reasonable time to allow to the traders for taking delivery of the potatoes and releasing the wagons? That is the question which comes before us as arbitrators under the order of the Board of Trade. The traders in their applications raised certain contentions with a view to showing that they were entitled to the same period, twenty-one days, that had been allowed by the railway companies before 1913, but in my opinion they all failed. It was said, first, that there was a contract between the companies and the tenants of the warehouses and "runs" in the markets or depots at St. Pancras and King's Cross respectively, and that the time should not be curtailed. There was no evidence at all of any such contract. No real attempt was made to prove it. Even if any such evidence had been tendered, it would not have been admissible so far as the tenants were concerned. The tenants of the Midland Railway Co. expressly agreed, in writing, to unload and release the wagons within the time allowed by the company's regulations; and the tenants of the Great Northern Railway Co., although the regulations as to the wagons were not specifically mentioned, agreed, in writing, to observe and abide by any regulations that the company might make for the conduct or efficient working of their business. It is quite impossible in the face of these written agreements to contend that the companies could be

bound by a verbal contract, if there was any evidence of it, to allow any definite time for taking delivery.

The next point taken was this: that the traders had entered into the agreements of tenancy in reliance on a continuance of the existing arrangements as to the twenty-one days within which to unload, and that the allowance of twenty-one days was therefore a reasonable facility of which the traders were entitled to still have the benefit. This way of putting the contention, excluding the idea of contract, which I have just dealt with, may mean, and I think was intended to mean, that in some way the companies were estopped from denying that twenty-one free days were a reasonable facility. If that was the contention it is clearly unfounded. There was no estoppel. The companies made no representation of an existing fact on the faith of which the traders were intended to act and did act. It may only mean that in determining what is a reasonable time, one ought to give effect to the fact that the traders were relying, when they entered into the agreements, on a continuance of the existing state of things. Whether that is so I will consider when I deal with the question "What is a reasonable time?" to which question alone it is relevant.

Then it was said that there has been an increase in a "toll rate or charge" within the meaning of section 33 (6) of the Railway and Canal Traffic Act, 1888, and that as it has not been duly notified and published it is illegal. This was not really seriously pressed. It is clearly an unfounded contention. The Act refers to rates which a railway company must publish in their books—rates for the conveyance of traffic, and the charge for an unreasonable detention of wagons is not within this sub-section of the Act.

Lastly, it was said that there has been an increase of a "rate or charge" within section 1 (1) of the amending Act of 1894, and that the onus is on the railway companies to justify it. It is not perhaps necessary to express any opinion upon this question, as it is, I think, clear that the

circumstances have so altered with regard to the necessity of having wagons promptly discharged so that they can be utilised without delay, that the railway companies have discharged any onus that may be upon them. But, as the question has been argued, I think that it is desirable that I should deal with it. In my opinion there has been no increase of a rate or charge within the Act of 1894. When a railway company find, or think they find, that their wagons have been hitherto detained for a longer time than is reasonably necessary, and claim to have them released more expeditiously, they are not increasing a rate or charge within the meaning of the Act. If they were, then it would be equally true to say that if they are more strict than they formerly were in enforcing the observance of a regulation as to detention of a wagon, they are increasing a charge for the wagon. They are entitled to have the dispute, if there is a dispute, referred to arbitration. The section has no application to a regulation controlling the length of time during which a wagon may be detained by a consignee. It relates to rates or charges made by the company as carriers of goods. It may include a charge for a terminal service, or a cartage rate, as was held in *The Mansion House Association of Railway Traffic v. London and North Western Railway Co.*,¹ but that is a charge made for a service ancillary to the conveyance of goods. I think that this Court, who decided that case, took that view in *Manchester and Northern Counties Federation of Coal Traders Association v. Lancashire and Yorkshire Railway Co.*,² which was decided in the following year. It is quite true that there an unlimited time had been allowed prior to the time when the regulation which was attacked was made, so that in one sense there was no "increase"—there being no change from one figure to another higher figure. But I do not think

(1) *Ante*, Vol. IX. 174; [1896] 1 Q. B. 273.

(2) *Ante*, Vol. X. 127.

that Mr. Justice Collins, who pointed this out, intended to rest his decision upon this ground. The learned Judge, at page 140 of the report, said that the question of the “*quantum* demanded from the persons who do accept the privilege of keeping their goods there beyond the period covered by the carriers’ rate” was a question expressly reserved for the consideration of an arbitrator. And the House of Lords held, in *Midland Railway Co. v. Loseby & Carnley*,³ that any question as to the reasonableness of the length of time allowed by the company was a question for an arbitrator. In my opinion we have, as arbitrators, to say what the reasonable period is, and the Act of 1894 has no application to such a question.

I now come to the question which, as I have said, is the only one that presents any difficulty: What is a reasonable time? No question has been raised as to the tenants having bound themselves by agreement to observe the companies’ regulations, nor, I think, could it be, as the regulations, to be enforceable, must be reasonable. Now one thing is clear, namely, that the transit comes to an end, and the company cease to be carriers, not necessarily when the wagon is at the tenants’ “runs,” as was contended, but when it has arrived at the station or yard—the lower level in the Midland case—and notice has been given by the company, and they are ready and willing to place it at the run. If the trader is not ready, or is unwilling to take it, he cannot thereby extend the obligations of the company as carriers. The question, therefore, is: How many days ought the traders to be allowed for taking delivery after the transit is at an end in that sense? One contention I must notice, as it has been raised. It was said that as the traders gave notice that they did not require the service they cannot be charged. It is difficult to believe that this was a serious contention, as the traders availed themselves of the service and detained

the wagons. It is quite impossible to support it. The real question is: What circumstances may be taken into consideration in determining what is a reasonable time? It must be reasonable in all the circumstances, no doubt, but what ought one to have regard to? Certainly not the exigencies of the business of a particular trader. Most of the evidence called for the traders was directed to showing that they could not successfully carry on their business unless they could store potatoes in the wagons. They often did not know, it was said, what varieties of potatoes were coming forward. They often receive potatoes not readily saleable, and they could not conveniently store them in their limited warehouses at once. Matters of that kind have often been held to be irrelevant to the question as to what is a reasonable time. They obviously cannot be taken into account in deciding how many days it would take a reasonably diligent consignee to take delivery of his goods. Moreover, considering that different merchants carry on their businesses on different lines, it is plain that no solution of the problem could be arrived at on any such lines as that. The great point that was made was the one I have already mentioned, namely, that as the traders entered into their agreements of tenancy in reliance on their being allowed to store potatoes in the wagons it ought to be conceded to them as a reasonable facility. Mr. Justice Collins in the Manchester case referred to an argument of that kind, but expressed no opinion as to whether the matter was one which an arbitrator could legitimately take into consideration. In my opinion, we cannot give effect to it. I do not think that it can be any more relevant to the real question we have to decide than the exigencies of a trader's business are relevant. It throws no light upon the question, How long would a reasonable trader require to take delivery? If the railway companies never undertook to give the extended time for an indefinite period I do not see how a trader can be heard to contend that he was reasonable in expecting that they would.

He ought to have made it a term of his contract if he was in truth relying on it. A curious result would follow if we adopted the view contended for. A new tenant who comes in after our order is made would be getting the benefit of some other trader's expectation, when he himself had no ground for entertaining it; an impossible position, in my opinion. What I think we can and should have regard to is the position of things in the markets, and the way in which the business would necessarily be conducted there to the knowledge of both contracting parties, and I think also the fact that the tenants were bound, in the Midland case, to have all their traffic conveyed by that railway, and in the Great Northern case also to have a minimum quantity of potatoes conveyed by that railway.

Looking at all these circumstances, I think that the reasonable time to allow to the tenants is four days commencing from the time I have already indicated. The evidence as to the amount of demurrage incurred since the time was restricted in 1913 satisfies me that the traders in the two markets or depots can perfectly well release the wagons in that period, and the companies, on the other hand, have allowed that time for more than three years since they began to impose the restrictions. The same time should, I think, apply to all the traders who receive their potatoes at these markets or depots. No ground has been shown for applying it to traders outside these markets. In their case I think that two days are sufficient. This is the proper order, I think, to make in those cases.

LORD TERRINGTON: These two applications by the Midland Railway Co. and the traders respectively were heard together. They in effect involve the same issue.

In the railway company's application we have to determine what is a reasonable time to allow to the traders, in the circumstances of the case, for taking delivery of the goods consigned to them, and what is a reasonable charge for the

railway company to make after the expiration of that time. We have to determine that issue in our capacity as arbitrators appointed by the Board of Trade under the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891. It is the only issue which, in the exercise of that jurisdiction, we can determine.

But the traders have filed a separate application under the Traffic Acts. In this they challenge and dispute the action of the railway company in reducing the time hitherto allowed for taking delivery of the goods consigned to them on two grounds. First, they allege that there has been an indirect increase of the charge for demurrage by reason of the diminution of the time allowed for taking delivery after conveyance which could not be justified as reasonable under the provisions of the Traffic Act of 1894. Secondly, they say that there has been, with regard to the alleged increases of charge for demurrage, no compliance with the statutory requirements as to giving public notice of the intention to make such increases, and that therefore they were illegal. As to the first point, there has been, no doubt, a curtailment of the traders' convenience, but for the reasons explained hereafter I am of opinion that they could maintain no right to such convenience. The question involved is not that of a charge appertaining to the carriage of the merchandise to which the Act of 1894 applies. It is solely as to the reasonableness of time in which the delivery should take place. What was reasonable at one time and under one set of circumstances may become unreasonable under different circumstances. Any charge in question relates not to the carriage of the goods, but to their detention when such carriage is over. I can see no distinction in point of principle between the facts of this case and those in the *Manchester Traders' Case*,¹ where Mr. Justice Collins decided that there had been no increase of charge. But if in

point of law there has been any such indirect increase, then I am clearly of opinion upon the facts that the change is justified by the altered circumstances under which the traffic had to be carried on.

The next contention was not seriously pressed, and we disposed of it adversely to the traders during the argument. The rate required by the Traffic Acts to be published in the books kept at the station for public inspection is the rate charged for the carriage of traffic and not the charge made for the detention and use of trucks after conveyance. Such a charge is for a service which is not covered by the rate for the conveyance or station terminal. It is only such increases as are intended to be made in the rates so required to be published which are required to be advertised in the manner prescribed by sub-section 6 of section 33 of the Act of 1888.

The real and effective issue, therefore, in both applications is what, in all the circumstances, is a reasonable time for taking delivery of the traders' goods. The railway company say it should be two days after the arrival of the goods at the station, exclusive of the day of arrival. The traders say broadly that the period should be twenty-one days.

The facts out of which the dispute arises appear to be as follows: In or about the year 1888 the Midland Railway Co. opened a potato market at their Somerstown depot near St. Pancras, with the intention, it was stated, of competing with the Great Northern Railway Company's then existing potato depot at King's Cross. The Somerstown depot established by the Midland Railway Co. comprised a number of warehouses, having platforms abutting on "runs" or sidings which communicated with the rails in the adjoining goods yard. Each of the said warehouses, together with its adjoining "run" or siding, was let to and occupied by the different traders who appeared before us and who are potato merchants or salesmen in a large way of business.

The tenancy agreements by these traders with the com-

pany were terminable (except in one case) upon three months' notice by either side. The tenants were required during the currency of the agreements to receive and forward by the Midland Co. all the traffic which the company could convey. The total potato traffic has largely developed since the market was established, and that of the traders in question was said to amount to over 50,000 tons a year.

The way the traffic was dealt with is as follows: trucks of potatoes were consigned by the grower to the trader at Somerstown Market, either as a purchaser outright or, more frequently, as a salesman on commission. Sometimes they were sent in bulk—that is, loose in the truck—and had to be put into bags by the consignee at his warehouse; in other cases they were put into bags before they were despatched, and since the war commenced this has been the prevailing practice. Sometimes the consignor advised the consignee of the despatch, but more frequently he did not do so. The first notice the consignee got of the consignment was an advice note from the railway company of the arrival of the wagon at Somerstown. Not one of the traders, however, could produce any original advice note. The railway company put in one of the forms of advice note, dated 1910, which, it was stated, was the same as had been used for 20 years, the only variation being that the former charge in the printed general conditions endorsed of 3s. a day for demurrage had been recently reduced and altered to 1s. 6d. a day. This advice note is headed, "Advice note of arrival of goods carried at station to station rates," and warned the consignee that demurrage would become payable if the goods conveyed were not removed or disposed of within a stated period. On the arrival of the loaded wagons at the high level station of the Midland Co. at Somerstown they were lowered down to the lower goods yard, which was on the same level as the traders' "runs" attached to their warehouses. They were then put into what are known as the "stock roads" or sidings, which are what may be

termed "wait order" sidings. A stock book is kept by the company in the yard, showing the number of every truck and where it is in the yard, and the traders had ready access to this book. On the receipt of the advice note, the trader filled up a form and sent it each evening to the railway company's foreman, stating what loaded trucks he required to be put into his run for the next day's working. This notice (which was put in evidence) identified the number of the truck, the station of origin, where it was standing in the yard, and to whom it was invoiced. The notice was given by the trader, not in accordance with the order of arrival of the truck, but according to his customers' demands. If his warehouse was not full, he would take delivery into his warehouse, but if he had not room in his warehouse or had no immediate customer for his goods, he left the potatoes in the truck on the stock yard sidings until he was able to effect a sale. In other words he used, and claims the right to use, after conveyance, the company's own trucks for storage purposes free of any charge for the lengthened period before mentioned.

For the tenant traders it is contended that when the market was built, and they or their predecessors became tenants of the warehouses adjoining the Somerstown yard, it was part of the bargain that such traders should have a free period of twenty-one days for taking delivery of their goods—in other words, that they should enjoy the facility of storing their goods in the trucks for that period free of charge. Such facility, they allege, was given to enable the Midland Co. to compete with the Great Northern Co. at their rival market, and it was, according to their contention, essential to enable the traders to carry on their trade profitably. This applied to goods carried in the company's own wagons. With regard to goods carried in wagons belonging to other railway companies (called by way of contrast "foreign" wagons), the free time originally allowed was fourteen days. This was reduced some time prior to 1913 to six days.

On December 1, 1912, the railway company gave notice to the traders that on and after January 1, 1913, revised charges and conditions would be put into operation, and that after the expiration of two days, exclusive of the day of arrival, 1s. 6d. per wagon per day would be charged for the detention and use of such wagon. The traders objected, and the railway company then informed them that they proposed to allow after conveyance four days free of charge instead of two days as stated in the notice of December 1, 1912. On July 31, 1916, the railway company cancelled this last-mentioned proposal as from September 1, 1916, and informed the traders that from that date they would adhere to and enforce the charges under the notice of December 1, 1912.

The railway company deny that there was any such bargain as is alleged, and the written agreements of tenancy contain no reference to such bargain, nor to any conditions whatever as to the user of the wagons by the traders for storage purposes. I am satisfied upon the evidence that no contract or bargain to this effect ever existed.

There is no doubt that in practice the company did abstain from enforcing any claim for demurrage during the period stated, and that the traders did receive and enjoy this gratuitous accommodation, but there was no bargain founded on any consideration giving the trader any legal right to the allowance. It was a voluntary abstention by the railway company from enforcing their rights under their statutory powers, which they obtained for the first time by their Act of 1891, to charge for the accommodation. It was argued that the traders had enjoyed the facility of practically storing their goods in the trucks of the railway company on the stock roads for such a lengthened period without charge that it was unreasonable to discontinue and deprive them of it, that it was essential for the carrying on of their business profitably, and that they were therefore entitled to what they asked as a reasonable facility.

Whether, however, a facility is reasonable must be examined from the point of view of reasonableness as regards the railway company as well as regards the trader. It was urged very cogently by the railway company that the long detention of their trucks on the sidings dislocated and hampered their traffic by holding up and putting out of use for carrying purposes in the aggregate an enormous number of vehicles; that this had become a growing evil and constant cause of complaint by all the railway companies, and that the limitation of period by them for detention was not to penalise the trader or so much to exact remunerative repayment for their use as, by obtaining prompt release of the wagons, to secure freer working of the rolling stock and more expeditious movement and handling of the general traffic. In this connection it is not unimportant to observe that the traders, since the railway company gave the notices under consideration, have shown a marked improvement in the despatch with which they took delivery of their goods compared with what they did previously, and the principal trader who gave evidence admitted that the delivery of an equal quantity of tonnage had been accomplished since 1914 without practically incurring any charge for demurrage whatever. I do not overlook the fact that one of the reasons assigned for this was that during the war there had been such a demand for potatoes that there had been difficulty in meeting the supply, and that consequently the necessity for storage had more or less disappeared, but I have no doubt in this trade, as we have experienced in other trades, when the railway necessities compel it, greater expedition can be used by traders in unloading the wagons and removing the goods without any real detriment to their business. I come, on carefully considering the whole circumstances, to the conclusion that it would not be just and equitable to make the order for facilities which the traders ask for.

The principles governing the rights of the trader and the obligations of the railway company under circumstances

similar to those in this case have been settled by previous decisions of this Court. The obligation of the company as carriers ends when the period reasonably necessary for enabling the consignee to take delivery begins. When is that period? The rate charged to and paid by the trader and published in the rate book was a station to station rate. It included conveyance of the goods to the station where the trader had to take delivery and the fulfilment by the company of their obligation as carriers. It did not include, as the argument for the trader implied, any charge for the use of these wagons as a warehouse or depot, and, as was said by Mr. Justice Collins in *Manchester Federation of Traders v. Lancashire & Yorkshire Railway Co.*,¹ it would have been very improper to have included such accommodation in the rate.

The terminal station was the Somerstown Goods Station. In the case of these tenant traders, the company for their convenience carried the goods to the platforms of their several warehouses, which in practice were regarded as part of the terminal station. If the trader was not ready to take delivery at his run on the arrival of the goods in the station yard after reasonable notice, because his run or siding was blocked by other traffic belonging to him, or because of the exigencies of his business, meaning thereby that his warehouse and platform accommodation were fully occupied or because the supply of goods exceeded the demands of his customers, and delay was thereby caused, it was the trader's fault, and the time ran from the moment when the railway company were ready to put the wagons into the run.

Now two reasons were assigned by the traders for not taking delivery into their runs when notified of the arrival of the wagons; the first was that their runs might be already blocked with wagons waiting to be discharged, and the second was that they did not order wagons into the runs until they

had accommodation for their contents in their warehouses. The removal of both these difficulties, they said, depended on the demands of their customers and the saleability of their goods. But neither of these are causes of delay for which the railway company can be held responsible. They are really and admittedly occasioned by the exigencies of the traders' business, and this Court has already decided, both in the *Manchester Traders' Case*,¹ and in the *Coltness Iron Case*,² that the cost of whatever is due to such a cause must be borne by the trader.

In view of all the circumstances of this case I think the period of two days after the arrival of the goods at Somers-town Station fixed by the railway company is insufficient, and that the period of allowance to the trader for taking delivery after conveyance should be four days (exclusive of the day of arrival) from the notice of arrival of the wagons at the lower level of the Somerstown Goods Station. The charges for wagons and sheets to be as prescribed by the railway company's notice, and that this should be the order made as regards the railway company's application. The application by the traders should be dismissed. As to the claim arising in respect of Mr. Patrick, who is a tenant trader at the West Hampstead Station, occupying a warehouse or shed with his own exclusive siding at that station, I see no ground, having regard to the facilities available at that station, why two days after the day of arrival should not be sufficient for taking delivery of the goods consigned to him. I think the like order should apply in the case of A. J. Sole, Lim., at West Kensington.

In the Great Northern Railway Co.'s case I have written a separate judgment.

These applications by the Great Northern Railway Co. against traders, and by tenant traders against the Great Northern Railway Co. are similar to those with which we

(1) *Ante*, Vol. X. 127.

(2) *Ante*, Vol. XIV. 246.

have dealt in connection with the Midland Railway Co.'s potato market at Somerstown. They arose in connection with the traffic at the potato market of the Great Northern Co. at King's Cross, which has been established over sixty years. It was pressed upon us that in some respects the facts in this case told more strongly in favour of the trader. As regards the construction of the market and the method of working the traffic the material facts were the same. The tenants of the warehouses had agreements, terminable at short notice, with the railway company. These agreements bound each trader to carry a minimum quantity of 2,000 tons of potatoes per annum; and the trader also undertook to observe and abide by any regulations that might be made by the railway company for the conduct of this business or any other regulations or order that might be given for the efficient working of the general business of the company so far as they concerned or affected the tenant. It was proved that from September 1, 1875, demurrage regulations had been made whereby, as regards all "foreign" trucks placed in the runs or roads adjacent to the market by 9 a.m. each day, the trader would be charged 3s. per wagon per day if the trucks were not emptied by the close of the following day; and that in respect of "local" wagons so placed a charge of 3s. per day would be made according to existing rules. A circular notice by the railway company of December, 1878, was also referred to, stating that no demurrage would be charged until the truck was placed in the market, when four days would be allowed for unloading; after that 3s. per day would be charged up, but such a proportion be remitted as might be agreed on.

For the traders, Mr. Whitehead contended upon the evidence that these documents showed, first, that a practice existed, and was acted on, whereby the railway company undertook the obligation of carrying the goods to the runs as part of their obligation as carriers, and thereafter allowed four free days; and, secondly, that they abated 75 per cent.

of the charge of 3s. per wagon for demurrage, and only charged 9d. per wagon as against a present charge of 1s. 6d. per wagon for a less period. Further, that prior to being put into the runs, the company allowed unlimited time for the wagons to remain in the goods station sidings. Mr. Grinling, who gave evidence for the railway company, said that so far as the Great Northern or local wagons were concerned the practice had remained the same from 1875 down to 1912. The gratuitous accommodation as a convenience had been allowed to the traders for their wagons practically indefinitely on the blue lines or sidings in the yard adjacent to the market, and the change which was now proposed was to withdraw this voluntary concession and put a limit on that accommodation so as to compel the trader to unload and set free the wagons with reasonable despatch. He said that as a fact no demurrage on local wagons had been enforced prior to 1912. The only controversy with the traders had been as to "foreign" wagons, as to which the company were under obligations to other companies to pay for their detention, if not returned within a limited period.

It is clear that in this market the traders did not, in respect of local wagons, prior to 1912, pay any charges until the wagons were put into their runs. This was a concession on the part of the company which they were under no obligation to make. I can find no evidence of any contract binding the company to continue for an indefinite period the concessions which they made. I think that, subject to the period allowed being, in the view of an arbitrator, a reasonable period, they were at liberty to withdraw or modify the time allowed for delivery; and having regard to all the circumstances, which are so similar to those at Somerstown, the same order that we have made in that case should be made in this case—namely, that as regards the King's Cross potato market, the period of allowance to the trader for taking delivery after conveyance should be four days (exclusive of the day of arrival) from the notice

of arrival of the wagons at the York Road Station at King's Cross. The charges for wagons and sheets to be as prescribed by the railway company's notice. The application by the traders is dismissed.

LUSH, J.: Mr. Gathorne-Hardy has expressed his agreement with these judgments.

Solicitors—Beale & Co., for the Midland Railway Co.; R. Hill Dawe, for the Great Northern Railway Co.; Neish, Howell & Haldane, for the defendants.

CALEDONIAN RAILWAY CO. v. JOHN G. STEIN & CO., LIM.¹

Detention of Wagons—Demurrage Charges—Wagons not owned by applicant Railway Company—Meaning of "By way of addition to Tonnage Rate"—Rates and Charges Orders, 1891—2, s. 5 (4).

June 17, 18. October 23, 1919.—The expression "By way of addition to the tonnage rate" in s. 5 of the Railway Rates and Charges Orders, 1891—2, means "over and above the tonnage rate," and does not relate to the contract of carriage between the consignor of the traffic and the railway company receiving the same. Therefore, a railway company upon whose railway wagons are detained after conveyance owing to the alleged failure of the consignee to accept delivery, are entitled to claim from such consignee demurrage charges in respect of the detention of all wagons, whether owned by themselves or other railway companies, irrespective of any contract of carriage between the consignor and another railway company.

This was an application by the Caledonian Railway Co. to the Court, sitting as arbitrators appointed by the Board of Trade, to determine a difference between them and the defendants with reference to certain demurrage charges which

(1) Before Lord Mackenzie, Lord Terrington, and Sir Matthew Wallace, sitting at the Parliament House, Edinburgh.

the applicants claimed to be due to them under section 5 (4) of their Rates and Charges Order, 1892, in respect of (a) the detention of wagons belonging to themselves and other railway companies, and (b) siding rent in respect of traders' wagons detained at the request or for the convenience of the defendants.

The defendants were fire brick manufacturers and their works at Castle Cary, about $1\frac{1}{2}$ miles south of Greenhill, where there was a station and marshalling yard, had private sidings connected with the railway company's main line. These sidings had been constructed in 1903 under an agreement between the parties, which also provided for the construction of certain additional sidings, but these latter had not been made, although the railway company had suggested that this should be done on two occasions.

The application included a small claim in respect of outward traffic, but the main issue was in reference to inward traffic, which was taken to Greenhill, and was there marshalled in "wait-order" sidings, a daily advice note being sent to the defendants.

The railway company's case was that there had been a substantial increase in the traffic, amounting to 33 per cent. in 1918 as compared with 1910, and that the siding accommodation at the defendants' works was insufficient to accommodate the number of inward wagons waiting at Greenhill, with the result that these wagons were unreasonably detained on the railway company's sidings at that place.

The defendants' case on the facts was that the wagon detention at Greenhill was due partly to bad marshalling arrangements, and partly to the system of working which the railway company had adopted for their own convenience; they also relied on the fact that their siding arrangements had been approved by the railway company. A large proportion of the wagons were owned by other railway companies, but during the periods covered by the alleged detention, all ordinary wagons belonging to railway companies had been

subject to a system of a common user which had been approved by the Railway Executive Committee acting on behalf of the Board of Trade, the latter department being in possession of the principal railroads under section 16 of the Defence of the Realm Act, 1871. The defendants, in their answer, contended that the Caledonian Co. had no power to charge demurrage except for wagons belonging to themselves.

The accounts annexed to the application extended over the period from January, 1917, to July, 1918, but no question arose as to the reasonableness of the charges or of the free periods included in them.

C. D. Murray, K.C. (Dean of Faculty), and T. A. Gentles, for the railway company:

The railway company is entitled to recover the sums claimed under an implied contract with the defendants that the latter will pay for services rendered. The words "by way of addition to the tonnage rate" in section 5, sub-section 4, of the Rates and Charges Orders mean that any company which renders these additional services may charge for them independently of any contract of carriage made with another company which received the traffic. Otherwise the section is unworkable; and in any case the company receiving the traffic could not claim siding rent in cases of detention off their own line.

L. H. Strain, for the defendants:

The right to charge for detention of wagons under section 5, sub-section 4 of the Rates and Charges Orders is part of the contract of carriage between the consignor and the receiving railway company. Here the defendants are not the consignors, and where traffic does not originate on the Caledonian railway the applicants are not parties to the contract of carriage, and therefore cannot claim demurrage. The detention at Greenhill is during and not after conveyance. Further, the evidence is that the defendants' sidings are not always full and the railway company therefore cannot charge

for the use of their sidings when the wagons might have been accommodated in the defendants' sidings—*North Staffordshire Railway Co. v. Salt Union*.¹ The detention has been due to the fault of the railway company and their system of working and cannot be charged for—*Midland Railway Co. v. Black*.² The applicants can only claim in respect of their own wagons.

LORD MACKENZIE: The applicants, the Caledonian Railway Company, call on the respondents, John G. Stein & Co., Lim., to make payment to them of the sum set out in the application, as due to them for demurrage and siding rent. The respondents answer that the bulk of the wagons in respect of which the claim is made do not belong to the Caledonian railway; that under the general demurrage order a railway company have only right to charge demurrage on wagons "belonging" to them, and that they have therefore no title to demand payment. The argument was taken upon the inward traffic to the respondents' works. The respondents maintain that the company having the title was the company with whom the contract was made. It was further contended that on the terms of the published Schedule of Charges the party primarily responsible was the consignor, whereas, in the present case, the claim was against the consignee. I am of opinion that the respondents' contentions fail.

The argument was that demurrage and siding rent charges are "by way of addition to the tonnage rate"; and that, therefore, "the company" in section 5 of the Railway Rates and Charges Orders must be limited to the contracting railway company. I am of opinion that "By way of addition to the tonnage rate" means merely "over and above the tonnage rate." The section does not say "by way of addition to the sum for conveyance to be paid to the contracting company."

The respondents' argument may be tested by a reference to

(1) *Ante*, Vol. X. 161.

(2) *Ante*, Vol. X. 142.

the claim for siding rent. The wagons, in respect of which this is claimed, are traders' wagons detained at the applicants' wait order siding at Greenhill, where the Caledonian Railway Co. have their station and marshalling yard. The marshalling is done before the record is taken at this siding. The claim for the accommodation provided by the Caledonian Company on that siding is independent altogether of the ownership of the wagons.

In the case of demurrage, in respect of what are called "foreign railway wagons," that is, wagons belonging to railway companies other than the Caledonian Company, the result of the respondents' argument would be that if the Midland Railway Company consigned traffic from Birmingham to Castle Cary, and the demurrage was incurred by detention of the wagons on the Caledonian Company's siding at Greenhill, yet the company having the title to sue would be the Midland Company, and the person to be sued would be the trader who consigned the traffic from Birmingham. This would, in my view, have been an untenable position, even before what has been called the common user agreement of July 5, 1916. In consequence of this the railway companies can use as belonging to them the wagons on their respective systems, and charge demurrage on them. The Caledonian Company are not here seeking to recover demurrage for which they have to account to the other railway companies. They are seeking to recover what belongs to them. In the course of the proceedings it was arranged that the other railway companies should be sisted as parties, under reservation of all pleas open to the respondents. It is unnecessary to deal with the question of sisting because, in my judgment, the Caledonian Company have the title to recover these sums.

The question of fact raised is whether the wagons were detained at the request or for the convenience of the respondents. There is no dispute that they were detained. The answer to that depends upon the view taken of the sufficiency of the lay out at the respondents' sidings. Figures were

submitted of the average number of trucks per day that were waiting at Greenhill, and the average number per day handled at the Castle Cary sidings. We were asked to come to the conclusion that if the Caledonian Company dealt with the wagons in rotation it would be found there was no undue delay. There was, however, a lack of evidence to the effect that the respondents had urged that wagons should be sent down from Greenhill to Castle Cary and that the railway company had failed to do so. There is evidence that the railway company had sent down wagons which had to be taken back for want of room. There is also evidence that Stein & Co. do not themselves observe the strict rotation of the wagons, as they require certain kinds of fuel in different places which involves shunting. The respondents found on the fact that the Caledonian Company approved of the plan of the sidings at the works, and they complain that into the dead end at the main line only seven wagons can be put.

Upon the whole I am not satisfied that the delay is due to bad marshalling, nor do I think that the traffic is held up at Greenhill for the convenience of the railway company. The evidence goes to show that if the traffic was put direct into the Castle Cary sidings the works would be blocked. The detention at the Greenhill wait order siding was therefore for the convenience of the respondents. As was pointed out in the *Clyde Shipping Case*,¹ there is no use of sending on traffic unless the door is open. The Caledonian Company have invited Stein & Co. to improve their sidings which are awkward. The delay is due to this cause. The Caledonian Company's sidings are sufficient if Stein & Company's were.

A question was raised about refused traffic, but it appears that this was ultimately taken delivery of. I understand demurrage is only being charged on what was afterwards accepted.

A general question was sought to be raised in regard to the free time to be allowed for a particular kind of traffic handled—that is, bricks. I am satisfied that the principles

laid down in the *Coltness Case*² are applicable here. Something was attempted to be made of difficulties arising out of the war, more particularly as regards female labour, but I do not think it came to anything.

As regards the claim of the 33- $\frac{1}{3}$ per cent. discount, I am of opinion that in the circumstances of the case the respondents are not entitled to this. I understand accounts Nos. 1 to 7 are out of the case. There will be a finding in favour of the applicants as regards the rest.

LORD TERRINGTON: This is a claim for demurrage. The applicants are the Caledonian Railway Company, and the respondents are brick manufacturers, whose works known as the Castle Cary Brickworks, are situated on the Caledonian Railway about one and a-half miles to the south of Grenhill junction, between Glasgow and Stirling. The works are connected with the running line of the railway company by a loop line from the up main line. From that loop line there are branch lines into the sidings of the respondents. These sidings were constructed in 1903 partly on land of the company and partly on land of the respondents. The plan on the agreement between the parties provided for the construction not only of the sidings inside the works existing at the present time and coloured blue on the plan produced to us, but also of additional sidings coloured yellow. By such agreement it was provided that the applicants should construct only such portions of the above-mentioned sidings (blue and yellow) as the respondents considered necessary from time to time for the working of their traffic. As a fact the yellow sidings have never been constructed. The applicants allege that the demurrage was incurred because of the inadequate accommodation at the respondents' works for receiving and dealing with the traffic which was largely due to the non-construction

(2) *North British Railway Co. v. Coltness Iron Co., ante*, Vol. XIV. 246.

of the yellow sidings. The respondents traverse this allegation, and say that the detention was caused by the applicants' method of working the traffic from Greenhill to suit their own convenience. This was the main issue between the parties on which considerable evidence was heard.

The substantial portion of the claim arises in respect of the inwards traffic. Ninety-five per cent. of this consists of coal and fuel requisites. The bulk of it comes from the direction of Glasgow and has to go past the Castle Cary works to Greenhill Junction. It is obviously impossible to deal with it on the running line. There is no accommodation at the works for putting off traffic from passing trains. It is necessarily taken to the marshalling sidings at Greenhill, where about 1,000 wagons per day are dealt with. The respondents' wagons on arrival at Greenhill are put into a "wait order" siding, and they are not recorded as having arrived until they are standing in such sidings. An advice note is sent daily to the consignee. They are detained there because it is not possible, the applicants say, to move them forward at once to the respondents' works owing to the lack of accommodation. The Traffic Superintendent stated that there was an average excess of sixty wagons per day of the respondents' traffic detained at Greenhill, owing to the want of sufficient accommodation at the works. The traffic is sent forward by shunting engine twice in the twenty-four hours from Greenhill to the works according to the respondents' instructions to suit their requirements. I am satisfied upon a careful consideration of the evidence and the method of working that the applicants have established in this case that the real cause of the detention was the inadequacy of the respondents' siding accommodation at their works, and not the bad marshalling or improper working by the applicants of their traffic. Such detention was, therefore, for the convenience of the respondents, and not of the applicants.

With regard to the other points argued before us, I agree entirely with the opinion of Lord Mackenzie. The applicants'

claim as revised before us, omitting accounts Nos. 1 to 7, should be allowed.

SIR MATTHEW WALLACE concurred.

Solicitors—D. L. Forgan, Glasgow, for the Caledonian Railway Co.; Drummond & Reid, W.S., Edinburgh, for the defendants.

GLASGOW AND SOUTH WESTERN RAILWAY CO., NORTH BRITISH RAILWAY CO., AND CALEDONIAN RAILWAY CO. v. BALLOCHNEY COAL CO., LIM.¹

Detention of Wagons—Demurrage Charges—Ownership of Wagons—Delay due to Outside Causes—Rates and Charges Orders, 1891-2, s. 5, sub-s. 4.

June 17, October 23, 1919.—Where a railway company have issued a circular stating that the person by whom or on whose account an order for wagons is given shall be primarily responsible for their due loading and discharge and . . . shall be primarily liable to pay all demurrage charges incurred, and where the company have completely fulfilled their part of the contract of carriage, they are entitled to charge and recover from the consignors of the traffic conveyed demurrage charges in respect of all railway owned wagons detained upon their railway after conveyance, and not merely in respect of their own wagons, although the original contract of carriage was made with another railway company, and the detention was due to causes beyond the control of the traders concerned.

THIS was an application originally made by the Glasgow & South Western Railway Company to the Court sitting as arbitrators appointed by the Board of Trade to determine certain differences between them and the defendants with reference to certain demurrage charges which that railway company claimed to be due to them under Section 5, sub-section 4 of their Rates and Charges Order, 1892, in respect of

(1) Before Lord Mackenzie, Lord Terrington, and Sir Matthew Wallace, sitting at the Parliament House, Edinburgh.

the detention of wagons belonging to themselves and other railway companies.

The defendants owned collieries at Ballochney and Lochrigg near Airdrie which were connected with the railway of the North British Railway Company, and they dispatched coal and dross from these collieries to, among other places, Ardrossan and Ayr Harbours for shipment and to Stevenston, all of which places were on the system of the Glasgow & South Western Company. With regard to the shipment of coal consigned to Ardrossan and Ayr, the practice was that the North British Railway Company hauled it from the collieries to College Junction, Glasgow, where it was handed over to the Glasgow & South Western Company, but it was not forwarded from College Junction until an "opening order" was received by the latter railway company from the shipping agents at the port. This "opening order" stated the date on which the traffic was to be forwarded, and also generally gave the name of the ship and the amount of the traffic.

In the present case "opening orders" were given from time to time to the Glasgow & South Western Company's representative at Ardrossan or Ayr by one or other of certain firms of shipping agents at those ports to forward the wagons containing shipment coal from College Junction to one or other of the two ports as the case might be, the great proportion of the traffic being consigned to Ardrossan. It was stated that these shipping agents acted both for the purchasers and the defendants, and a specimen order was produced at the hearing signed by Messrs. A. & J. Guthrie, shipping agents at Ardrossan, as "agents for Alexander Trew and Company," who were selling agents for the defendant company. Upon receipt of the "opening order" the Glasgow and South Western Company in each instance forwarded the wagons to the named port of shipment where they were detained, owing to shipping delays, for various periods prior to the coal contained in them being shipped. Notice of arrival was given to the shipping agents. It was in respect of this latter deten-

tion that the several claims for demurrage charges were made, allowance being made in each case for the free periods allowed by the published notices of the Glasgow & South Western Company. The wagons in respect of which demurrage was claimed were owned mainly by the North British Railway Company, and in a relatively small number of cases by either the Caledonian or Glasgow & South Western Companies. The period over which the several claims extended was from February, 1916, to October, 1917, but no question arose as to the reasonableness of the charges claimed—namely, 1s. 6d. per day per wagon not exceeding sixteen tons capacity. The free period allowed was four days, reckoned from 6 a.m. of the day following the arrival of the wagons at the port of shipment.

A further claim arose in respect of twenty-five wagons owned by one or other of the afore-mentioned railway companies. These wagons contained dross, and were consigned by the defendants to the works of Messrs. Nobel at Ardeer, near Stevenston, on the Glasgow & South Western Railway. They were put into Messrs. Nobel's private sidings on various dates between July 30 and August 9, 1916, but Messrs. Nobel refused to accept the dross in them on the ground that it was of inferior quality. All the wagons were taken out of the above private sidings and placed in the railway company's sidings at Stevenston. The Glasgow & South Western Company then informed the North British Company's representative at Airdrie and the defendants also were informed by their selling agents that Messrs. Nobel had refused to take delivery of the dross. On August 19 the Glasgow & South Western Company's representative at Stevenston received instructions from the defendants to forward nine of these wagons to another destination, and this was done. The remaining sixteen remained on the railway company's sidings at Stevenston until October 20, when the defendants gave instructions to have them forwarded to other places, which was done. The Glasgow & South Western

Company claimed demurrage on the above scale in respect of the above detention of these wagons on their sidings at Stevenston. The defendants in their answer submitted that their contract was with the North British Company only, and they also called upon the Glasgow & South Western Company to specify their right to claim demurrage in respect of wagons belonging to other companies. In order to meet these objections the Glasgow & South Western Company joined the North British & Caledonian Companies as co-applicants.

The three railway companies in August, 1908, had published and circulated among their customers a circular stating the conditions upon which wagons were supplied to traders; these provided (*inter alia*) that "the person (including a company or partnership) by whom or on whose account the order for wagons or sheets is given shall be primarily responsible for their due loading and discharge."

With regard to the ownership of the wagons in question the three railway companies had come to a "common user" arrangement of their wagons on June 5, 1916, before which date a small part of the amount claimed had been incurred; but apart from this, evidence was given on their behalf that it had been their practice for many years to charge for the detention of wagons on their lines irrespective of ownership. The defendants in their answer further alleged that the detention of the wagons in question was due to the war and to the non-arrival of ships owing to Government control and enemy submarines.

Sandeman, K.C., and D. Jamieson, for the Glasgow & South Western Railway Company:

With regard to the right to claim demurrage, the Glasgow & South Western Company have rendered the services here. In any case, any technical objection has been overcome by the joinder of the North British and Caledonian Companies. The defendants, further, must be taken to have accepted the published conditions as to wagon detention—see *Glasgow &*

*South Western Railway Co. v. Polquhairn Coal Co.*¹ The contract of carriage has been performed by the railway company, and the fact that detention may be due to causes beyond the control of the defendants cannot affect the rights of the parties—*Blackburn Bobbin Co. v. T. W. Allen & Sons.*² The railway company were not under any obligation to give the defendants notice that Nobels had refused to take delivery—*Hudson v. Baxendale.*³

L. H. Strain, for the defendants:

The contract of carriage was made with the North British Company, and the right to charge demurrage in respect of wagons under section 5, sub-section 4 of the Rates and Charges Orders is part of that contract; therefore the North British Company alone are entitled to sue. Further, the Glasgow & South Western Company in any case have only power under their Rates and Charges Order to charge demurrage in respect of their own wagons, and this cannot be enlarged by any “common user” agreement between the companies. This was recognised by the order made in *North British Railway Co. v. Coltness Iron Co.*,⁴ which was limited to “wagons belonging to the railway company.” The special circumstances due to the war also should be taken into consideration, for no general rule can be laid down—see the last-mentioned case⁵ and *Wallace Brothers v. Midland Great Western Railway Co.*⁶

The North British and Caledonian Railway Companies were not represented.

LORD MACKENZIE: The question of title to sue was raised in this case also. I refer to what has been said in the case of

(1) 1916, Session Cases, 36.

(2) [1918] 1 K. B. 540; [1918] 2 K. B. 467.

(3) 2 Hurlstone & Norman, 575.

(4) *Ante*, Vol. XIV., at p. 271.

(5) *Ante*, Vol. XIV., at p. 266.

(6) *Ante*, Vol. XV., at p. 73.

the *Caledonian Railway Co. v. John G. Stein & Co., Lim.*,⁽¹⁾ which is applicable to the present case. The objection to the title of the Glasgow & South Western Railway Company is, in my opinion, bad. It is proved by Mr. Robinson that the harbour of Ardrossan, the harbour of Ayr and Stevenston are all on the system of the Glasgow & South Western Railway. The speciality as regards the consignment to Nobels Company detained at Stevenston is explained by him. The Glasgow & South Western Railway Company were under obligation to place that traffic into Nobels' sidings. Those sidings were blocked, and the railway company had to occupy other lines, which they did, and warned Nobel & Company that they were incurring demurrage.

In the present case it was arranged that the railway companies with whom the contracts were made should be listed under reservation of the pleas of parties. I am of opinion that the Glasgow & South Western Railway Company have a title to sue without the concurrence of the other companies in respect of the services rendered by them.

A small portion of the accounts, £29, was incurred before the common user agreement was entered into, but that does not, in my opinion, make any difference.

Upon the merits of the case it was not disputed that the wagons were in fact detained at Ardrossan, Ayr, and Stevenston. The defence is that they were detained owing to causes over which the respondents had no control. The respondents' contention was that after the traffic was opened there was no ship to take the coal at the shipment end. Various causes were mentioned for this. The Irish Rebellion, submarine warfare, and Government control. The respondents have, however, entirely failed to prove that any of the causes for the delay in the account founded on were in fact due to causes for which the railway company were responsible. It is not said that the Glasgow & South Western Railway Company

opened the traffic too soon. The only point attempted to be made was that as matters actually turned out the intention to get the coal shipped was frustrated. The position of matters, however, was that the Glasgow & South Western Railway Company completely fulfilled their part of the contract to carry the goods. The expenses connected with the delay cannot, in these circumstances, fall on the railway company. The respondents have not proved that the railway company failed to give any notice which it was their duty to give. There is no reason why the principle of the demurrage order of 1911¹ should not apply to the present case. In terms of the published notice the railway company are entitled to charge the consignors. It was for the consignee to inform the consignor if he was not going to take the consignment. In the circumstances the respondents do not seem entitled to the discount asked.

The applicants are entitled to a finding in their favour.

LORD TERRINGTON and SIR MATTHEW WALLACE concurred.

Solicitors—Maclay, Murray & Spens, Glasgow, for the Glasgow & South Western Railway Company; Motherwell & McMurdo, Airdrie, for the defendants.

(1) *I.e.*, The order of the Court made in the case of *North British Railway Company v. Coltness Iron Company*, *ante*, Vol. XIV., at p 270.

BUTTERLEY CO., LIM., STANTON IRON WORKS CO., LIM., AND HOLWELL IRON CO., LIM., v. MIDLAND RAILWAY CO., LONDON AND NORTH WESTERN RAILWAY CO., AND LANCASHIRE AND YORKSHIRE RAILWAY CO.¹ (No. 2).

General Increase of Rates—Rise in Cost of Working as Result of Improved Labour Conditions—Cartage—Contributions to Pension Funds—Total Increase Placed on Exceptional Rates—Railway and Canal Traffic Act, 1913.

May 9, November 20, 21, 24, 25, 26, 27, 28, December 1, 2, 3, 4, 5, 8, 9, 1919, March 16, 1920. Upon a complaint of an increase of 4 per cent. in certain exceptional rates (being part of a general increase of that amount in all exceptional rates other than those for coal, coke and patent fuel), the Midland Railway Co., having made certain improvements in the employment conditions of their labour and clerical staff since August 19, 1911, pleaded that the increase complained of was justified under section 1² of the Railway and Canal Traffic Act, 1913, and following the method of proof approved by the COURT OF APPEAL in the case of *The Associated Portland Cement Manufacturers* (1900), Lim., v. *Great Northern Railway Co.*³ showed (a) what was the amount paid for a given week to their labour and clerical staff engaged in dealing with goods traffic after the said improvements in their employment conditions had been made, and (b) what amount would have been paid for the same week under the conditions of service existing on August 19, 1911.

The result of the railway company's calculations was to show that after allowing for certain small corrections the increased cost of working due to the said improvements exceeded the extra revenue derived from the above increase in rates by a sum of approximately £70,000.

The applicants contended (*inter alia*) that the proper basis of calculation was to compare the cost per train mile in June, 1913, with that in June, 1911.

Held, that the last-mentioned method of calculation was in violation of the above judgment of the COURT OF APPEAL. That the method of proof adopted by the railway company was right

(1) Before Lush, J., and Commissioners Lord Terrington and Mr. Tindal Atkinson, K.C., sitting at the Royal Courts of Justice, London.

(2) This section is set out on page 94 *ante*.

(3) *Ante*, p. 94.

and that, the applicants' criticism of their figures being ill-founded, the increase of rates complained of was justified.

Held, further, that cartage expenses and increased contributions to the Railway Clearing House were properly included as part of "the cost of working the railway" within the meaning of the said Act of 1913, and that contributions to retiring allowances, the Superannuation Fund, and the Pension Fund of the defendants' Friendly Society, were "improvements in the conditions of employment" and part of "the cost of working the railway" within the above Act.

Section 1 (1) (d) of the above Act of 1913 requires that a railway company shall prove "That the proportion of the increase of rates or charges allocated to the particular traffic with respect to which the complaint is made is not unreasonable."

Held that this sub-section does not require that an increase of exceptional rates should be limited to the same proportion as that which exceptional rate traffic bears to the whole of a railway company's traffic, and that "traffic" in the above sub-section refers to the class of goods—that is, the particular industry—in which the complainant is interested, the object of the sub-section being to prevent one trader from being unduly burdened by any increase of rates that may be made.

This was an application complaining of an increase of rates. The application was made against the Midland, London and North Western and Lancashire and Yorkshire Railway Companies, but the applicants gave notice to the two latter companies that they did not propose to question any part of the through rates complained of which was payable to them, and the application became in substance one against the Midland Company only.

The applicants severally were the owners of blast furnaces, iron and steel works and ironstone and limestone quarries, which with one exception were connected by private sidings with the railway of the Midland Company. Their traffic, other than coal and coke, consisted mainly of ironstone, limestone, sand and scrap iron inwards, and of pig iron, iron pipes, castings, iron bars and steel bridge work outwards. Nearly the whole of this traffic was carried at exceptional rates. In accordance with a published notice, dated May 15th, 1913, all exceptional rates other than those on coal, coke and patent fuel were increased by 4 per cent. on July 1st, 1913.

Class rates were not increased. All exceptional rates on the applicants' traffic other than coal and coke accordingly having been increased as from the above date as part of a general increase of exceptional rates, the applicants applied to the Court for an order declaring such increased rates to be unreasonable.

The Midland Company by their answer admitted the said increases, and pleaded that the same were part of and in the same proportion as the general increase of rates made on July 1st, 1913, and were reasonably required for the purpose of meeting a rise in the cost of working the railways of the defendants, excluding the cost of carrying and dealing with passengers, resulting from improvements made by them since August 19, 1911, in the conditions of employment of their labour and clerical staff, and were justified under the provisions of section 1 of the Railway and Canal Traffic Act, 1913, and/or having regard to the services rendered and received and their value and the trouble and expense and responsibility attending the receipt, carriage, and delivery of the applicants' traffic, there was a change of circumstances justifying such increases; and that such increases were reasonable.

The Midland Company adopted the same method of justifying the increases complained of as that used by the Great Northern Railway Co. in the case of *Associated Portland Cement Manufacturers v. Great Northern Railway Co.*,¹ that is to say, they showed by means of tables (1) the rise in the annual cost of working the railway (excluding passenger traffic) resulting from improvements made between August 19, 1911, and July 1, 1913, in the conditions of employment of their labour and clerical staff, namely, £235,254, and (2) the additional annual revenue derived from the 4 per cent. increase, namely, £161,367. Numerous tables were put in showing, as in the above case, (1) the amount paid to the staff

(1) *Ante*, p. 94.

in each department for the week ended June 26, 1913, which was the last completed week prior to the increased rates coming into force, and (2) the amount which would have been paid under the conditions of service existing on August 19, 1911. The applicants on their side put in tables upon the same basis showing the revised figures which as the result of their examination and criticism they contended should be substituted for those of the railway company. The respective sets of figures are set out in full in the judgment of the learned judge, and it is unnecessary to repeat them here.

The greater part of the arguments at the hearing was directed to a detailed criticism and defence of the respective tables put in by the parties and of the calculations upon which they were based, but the following questions of principle were also discussed, namely:—

1. Whether cartage was part of the “working of the railway” within the meaning of the Railway and Canal Traffic Act, 1913.
2. Whether certain increased contributions to the Railway Clearing House were part of “the cost of working the railway” within the above Act.
3. Whether increased contributions made by the railway company to (a) certain Retiring Allowances, (b) to the Superannuation Fund for their clerical staff to which the company were authorised to contribute by the Midland Railway (Superannuation Fund) Act, 1913, and (c) to the Pension Fund of the company’s Friendly Society, which was an approved society under the National Insurance Act, 1911, were “improvements in the conditions of employment of their labour or clerical staff” and part of “the cost of working the railway” within the above Act.
4. As to the class of persons who were to be included within the company’s “clerical staff.”
5. As to the construction of section 1 (d) of the above Act of 1913, which provides “That the proportion of the increase

of rates or charges allocated to the particular traffic with respect to which the complaint is made is not unreasonable."

It was contended on behalf of the applicants that the effect of this sub-section was to prevent the whole of the increased rate being placed upon the exceptional rate traffic as had been done in this case, and that every class of the company's traffic, other than passenger, ought to bear its proper proportion of such increase.

J. A. Foote, K.C., R. Whitehead, K.C., and E. Clements, for the applicants:

Sir J. Simon, K.C., Sir Lynden Macassey, K.C., E. Hills, K.C., and A. Moon, for the Midland Railway Company:

Sir J. Simon, K.C., G. J. Talbot, K.C., and Bruce Thomas appeared for the London and North Western Railway Company:

Sir Lynden Macassey, K.C., and J. B. Aspinall appeared for the Lancashire and Yorkshire Railway Company.

LUSH, J.—The applicants in this case are manufacturers of pig iron and iron and steel goods. They own and work blast furnaces and limestone and other quarries, which are connected for the most part with the Midland Railway by private sidings.

Their complaint is this, that the Midland Railway Company, the respondents, have—in exercise of the powers conferred on railway companies by the Railway and Canal Traffic Act, 1913, to raise their rates in order to meet the rise in the cost of working the railway (excluding passenger traffic) caused by the improvements which the companies had made since August 19, 1911, in the conditions of employment of their labour and clerical staff—raised a far larger sum than is justified. The applicants seek to recover, by way of damages, the excessive payments which they say they have been compelled to make in order to have their goods carried. The claim

involves a very large sum of money. If the applicants are right in their contentions, and if, as alleged, the respondents have acted upon an erroneous method of calculation of cost and revenue, and have taken items of cost into account which ought to have been excluded, similar claims will no doubt be made by other traders on other railway companies and the amount indirectly involved will necessarily run into large figures, some millions of pounds, we were told.

This case raises in a different form a similar question to that which was raised in the case of *The Associated Portland Cement Manufacturers* (1900) v. *Great Northern Railway Company*¹ which was tried in this Court and went to the Court of Appeal. The applicants there made the same complaint as that which is made by the applicants in this case, but it was made on a different ground. It is necessary, considering the criticisms made by the present applicants on the respondents' estimates and figures, to consider in some detail what the point was that was there raised and what the decision of the Court was.

The complaint in the earlier case was this. The Act of 1913 to which I have referred was passed, after a grave crisis had arisen in August, 1911, in the relations between railway companies and their employees. It gave power to railway companies who had, in consequence of that crisis, effected improvements since August 19, 1911, in the conditions of employment of their labour and clerical staff in the form of higher wages, shortening the hours of labour, etc., to meet the rise in the cost of working their railways (excluding the cost of dealing with passenger traffic) which these improvements caused, by raising such a sum as should be reasonably required for that purpose in the form of an increase of their rates on goods. Certain restrictions were placed by the Act upon the exercise of the powers so given to the railway companies. I will summarise the first three of these as no ques-

(1) *Ante*, p. 94; [1916] 2 K. B. 262.

tion has been raised with regard to them. The company has to prove, first, the rise in the cost (Section 1 (a)); secondly, that the whole of the increase of the rates which is complained of is part of an increase made for the above purpose (Section 1 (b)); thirdly, that the increase of rates is not in the whole greater than is reasonably required for the purpose (Section 1 (c)); the fourth and last restriction I will set out verbatim, as a question has been raised with regard to the construction of the sub-section, Section 1 (d): "that the proportion of the increase of rates or charges allocated to the particular traffic with respect to which the complaint is made is not unreasonable." There is a proviso to the section which it is not necessary to refer to, as nothing turns upon it in this case.

Now the Great Northern Railway Company, in calculating the rise in the cost of working the railway resulting from the improvements they had made, and in deciding what increase to make in the rates and the classes of traffic on which to impose it, had adopted the same principle and made the same increase of rates on the same classes of traffic as all the other companies. The chief officials of the several companies had met and discussed the position, and had arranged to act together, both in respect of the amount of the increase they should make and the classes of goods on which to impose the extra rate. It followed, of course, that the companies could not raise the full sum or the precise sum which the increased cost of working the railway represented. They would have to deal on broad lines with the position. The rise in the cost of working resulting from improvements, and the additional revenue derived from an increase of rates, would necessarily vary, and vary greatly, in the different railways, and the margin of increased cost over increased revenue would necessarily differ in amount in different cases. One company would, therefore, have to bear a larger proportion of the rise in the cost of working the railway than another company would bear. Every company would have to bear a portion of it. The plan adopted was this. The Great Northern Rail-

way Company and all the other companies decided to put an increase of 4 per cent. on all their "exceptional rate" traffic and to put nothing on the "class" traffic or on coal, coke and patent fuel. Almost all kinds of merchandise is carried at exceptional rates, so that practically no particular kind of merchandise was unaffected except coal, coke and patent fuel. The reason for this was, as was explained in the Great Northern case, that class traffic was already charged almost up to the maximum, and the rates on coal, coke and patent fuel had already been raised more than once, and it was not thought advisable to disturb the recent arrangements that had been made.

Now the companies had, of course, to consider what principle to follow in calculating the rise in the cost of working the railway (goods traffic) resulting from the improvements. They decided that they were not obliged to follow the principle which has always been applied where a railway company has to justify an increase of rate under the Railway and Canal Traffic Act, 1894, and it was that that gave rise to the dispute in the Great Northern case. A company that seeks to justify an increase under the Act of 1894 has a very great burden placed upon it. As Lord Cozens-Hardy, M.R., said in delivering the judgment of the Court of Appeal in the Great Northern case:¹ "In order to justify the increased charge it was usual for the Commissioners to consider all the circumstances of the railway at the time when the increase was made, including the receipts of the railway and the expenditure of the railway. The method usually adopted was to ascertain at each of the two periods the cost of carrying the traffic per ton per mile and the relative resulting receipts. This obviously involved an extremely elaborate calculation. It allowed the setting off against one increase of expenditure a saving on another item. For example, if expenditure on labour had increased but the cost of coal had diminished, the

company could not succeed to the full extent of the increase of the labour bill without allowing for the saving of coal." How elaborate the calculation is to which the Master of the Rolls referred will be appreciated when it is remembered that the company has to deal, in addition to the matters to which the judgment specifically referred, with the cost of working the particular traffic, that is the particular class of goods on which the increase has been imposed, and the receipts obtained from working it, comparing what the cost and receipts had been previously with what they were after the rate had been increased. The Great Northern Railway Company and the other companies adopted a very much simpler method in calculating the increase of cost under the Act of 1913. The Act of Parliament, having enacted that the company must prove that there had been a rise in the cost of working the railway resulting from improvements in the conditions of employment, and that the increase of rates made for the purpose of meeting that rise is not in the whole greater than is reasonably required for that purpose, the company claimed to be entitled to calculate the rise in the cost of working the railway in this way: They said (I cite again the words of Lord Cozens-Hardy):¹ "Take the actual figures in July, 1913, and see how far the work then done by the railway company in connection with goods traffic has cost more than it would have cost if the conditions had not been improved since August, 1911." As an illustration of the method which the companies adopted, Lord Cozens-Hardy took one of the tables which had been put in evidence with regard to the working of goods traffic at a particular station and said: "For example,² Spalding has been taken as a station in a particular week in 1913, the number of the staff employed for the purpose of goods traffic is given, the wages paid, including payments for overtime and Sunday labour, are stated, and it is then stated what payments would have been made to these men doing this

(1) *Ante*, p. 131.

(2) *Ante*, p. 131.

very work if the 1911 conditions had been in force, and the result is worked out.” The companies in making their calculations on this principle did this. I may repeat what I said in the Great Northern case with reference to the evidence which the respondents then gave as to the principle they had followed. “They¹ first proved what the total amount actually paid to their whole staff was during a particular week, the week ending June 28, 1913, which was the last week before the increased rates came into operation, taking the various departments, and adding them together. They then showed what those payments would have amounted to under the old conditions just prior to August, 19, 1911; the excess represented the extra payments made owing to the improved conditions of labour for that week. Treating this week as a fair average week, they got at the total extra payment for a year. They then proved what proportion of this amount represented goods as distinguished from passenger traffic according to engine miles.” I pointed out in that case that on this basis the figure for the increased cost of working the railway, excluding passenger traffic, was over £118,000, but that if the allocation between goods and passenger traffic had been calculated by engine hours instead of engine miles (which was the right method, the men being paid by time) the figure was raised to something over £120,000. The increased revenue was estimated at something over £69,000. The margin therefore of cost not provided for over increased revenue was, in the Great Northern case, very large, something over £50,000. This the company bore themselves. Now the applicants in that case contended that the principle followed by the company in estimating the rise in the cost of working the railway was wrong, and that the company ought to have followed the same principle and made the same comparisons and the same elaborate calculations as they would have done had they been justifying an increase of rates under

the Act of 1894. The question for the Court was whether they were right in so contending. It was held by a majority of the Court that they were not, and the Court of Appeal affirmed that judgment. In view of one of the questions which has been raised again in this case, as to the correctness of the method of ascertaining the rise in the cost of working the railway which the present respondents have adopted, I will cite another passage from the judgment of Lord Cozens-Hardy:¹ "The company deliberately omitted to furnish any such evidence as would be necessary to justify an increase under the Act of 1894 based in some form or other on a comparison of two periods, and in our opinion they were right in so doing."

In this case the applicants have of course conceded, in view of the judgments in the Great Northern case, although the admission was made with some reluctance by their accountant, Mr. Fells—the same accountant as had acted and given evidence for the applicants in the Great Northern case—that the principles followed by the respondents in calculating the rise in the cost of working the railway are correct. Mr. Fells accedes to it although he said he cannot agree with it "As an accountant." But they have criticised the method the respondents have adopted in calculating the figure. They still contend on the advice and evidence of Mr. Fells that it is not sufficient to take the work done by the men in the different departments in 1913 and calculate what it would have cost the company to do that same work under the old conditions. They say that a much more elaborate calculation has to be made. I will not at this moment pause to explain what their criticism is or what they say is the proper method to apply. I shall have to consider it in detail later on. But, as I say, they attack the respondents' method of calculation. They further say that certain items of expenditure which the respondents have taken into account in calculating the rise in

(1) *Ante*, p. 131.

the cost of working the railway ought to have been excluded. There are four or five large items, such as increased expenditure in carting goods, increased contributions to the pension fund, etc., which I will deal with under this second head or class of criticism. They lastly attack the respondents' calculations in respect of figures, which may be called accountant's criticisms. This class of criticism also includes items which are disallowed, such as sums which it is said should go to capital account, but I will deal with these under this head as they are not substantial items like the others raising important questions of principle.

The applicants, having by these three kinds of criticism attacked and greatly reduced the respondents' figure for the rise in the cost of working the railway, next deal with the additional revenue resulting from the increased rates, and here again, attacking the respondents' figures and calculations, they say that they have shown that the respondents' figure is untrustworthy and wrong. Their contention is that if the accounts are properly considered a much larger sum has been obtained from the 4 per cent. increase than the respondents have given credit for. Tables were prepared by Mr. Fells and were the subject of minute and prolonged discussion at the hearing showing on one side the respondents' figures and on the other the criticisms and revisions of Mr. Fells.

Now the results of the calculations of the respondents and of Mr. Fells respectively were as follows. The respondents' figures for (a) the increased cost of working the railway and (b) the additional revenue derived from the 4 per cent. increase are, Increased Cost £235,254, Additional Revenue £161,367. The difference showing the excess of the increased cost over the additional revenue is £73,887. In the course of the hearing before us the respondents admitted certain errors in their calculations, including errors in respect of (1) the week in June, 1913, which they selected, being slightly above the average: (2) an error in calculating what were called "holiday" payments, and (3) in their definition of the

words "clerical staff." If the figure £70,000 is substituted for £73,887, more than full allowance will have been made for these errors.

The applicants' figures, that is to say, Mr. Fells's figures for the same two factors are: Increased Cost £84,987, Additional Revenue £194,110. The difference showing the excess of the additional revenue over the increased cost is £109,123. These figures were slightly altered during the hearing. The £84,987 of Mr. Fells was raised to £87,089. But taking the tables Mr. Fells has asserted that instead of the respondents having a margin of cost over revenue of nearly £74,000 they have raised over £109,000 more than was necessary to meet the whole of the increased cost which they have incurred by reason of the improvements which they effected in the conditions of employment. The discrepancy between these two sets of figures is startling. So are Mr. Fells's tables. If he is right in his view as to what a railway company must do in order to arrive at a fair estimate of the rise in the cost of working their railway (excluding passenger traffic) under the Act of 1913, instead of their task being comparatively simple, as it was in the view of the Court in the Great Northern case, it is still necessary for them to make the most abstruse and elaborate calculations, and these calculations must be made, as I will point out later, not in one year, but in every year. Mr. Fells's tables, taking only the pages relating to his own calculations, cover more than eighty pages. The hearing before us, although only some half-dozen witnesses were called, lasted nearly three weeks, and the minute calculations which were considered to be necessary in order to solve what would appear to be a comparatively simple problem were such as to make our task, as well as that of counsel who were retained and the witnesses themselves, one of great magnitude. That skilled and experienced accountants, after giving the most detailed and protracted attention to carefully collated figures, should arrive at results so different is very surprising. There must, of course, be great errors on one side or the other, errors

of figures or errors of principle, or both. Are the respondents' accountants responsible or is Mr. Fells? He was the only witness called by the applicants. That is the question which we have to answer.

It will, I think, simplify my task, if such an expression is appropriate to such a case as this, if I set out here the principal reductions which Mr. Fells makes in the respondents' figures for their various departments, and to some extent dissect them. I only propose for the present to deal with the really substantial reductions. There are some small items none of which involves much more than £1,000, some less. They have not been seriously discussed, and for reasons which I will give later it will not be necessary to discuss them. They amount altogether to about £3,300. After I have stated these principal reductions, I will state what amount approximately is involved in each of the three classes of criticism by Mr. Fells, as I have already subdivided them. I only propose to give round or approximate figures in most cases. Exact calculations in a case involving figures of this magnitude and where the respondents' margin is so large are unnecessary. Mr. Fells's principal reductions in respect of the expenditure of the various departments are as follows:—1. Engineers' Department, Company's figures £28,782; reduced by Mr. Fells to £20,707. 2. Locomotive Running Department, Company's figures £35,780; reduced by Mr. Fells to £16,548. 3. Traffic Department, Company's figures £99,904; reduced by Mr. Fells to £31,918. 4. Police Department, Company's figures £7,739; reduced by Mr. Fells to £4,926. 5. Increased contribution to Railway Clearing House, Company's figures £2,072; reduced by Mr. Fells to nil. 6. Provision for supplementing retiring allowances to salaried staff, Company's figures £13,310; reduced by Mr. Fells to nil. 7. Additional contributions by Company to Superannuation Fund, Company's figures £11,783; reduced by Mr. Fells to nil. 8. Provision by Company for securing proper pensions to men, Company's figures £19,036; reduced by Mr. Fells to nil. It

will be seen that Mr. Fells disallows altogether the three large items relating to what generally I may call contributions to Pension Funds and also the item of Railway Clearing House payments. These amount approximately to £46,000. The other reductions amount approximately to £98,000. The item for the Traffic Department, however, includes a large sum, about £27,000, for cartage, and this item has been wholly disallowed. It raises a question of principle similar to that raised in the case of the pension contributions, and it will be convenient to treat it as one of the large disallowed items.

Rearranging the figures accordingly, they become approximately: Disallowed items, £73,000; Reductions, £71,000. These sums altogether amount to approximately £144,000. To this must be added the small reductions of about £1,000 each on other departments which I have already mentioned, amounting to £3,300, and an item representing a sum which Mr. Fells says should have been attributed to passenger and not to goods traffic and which he says the respondents have omitted to consider, £2,577; total, £149,877, approximately, £150,000. The exact difference between the figures of the railway company for the increased cost and those of Mr. Fells, namely, £235,254, and £84,987, is £150,267.

Taking next the additional revenue, Mr. Fells's figure with regard to this is, I have said, £194,110 against the respondents' figure £161,367. This discrepancy arises mainly from the different methods that have been adopted for calculating the respondents' share of what is called "through through" traffic, that is, traffic which passes over the respondents' railway so that they receive a share of the through rate, but which neither begins nor ends on the respondents' railway. As no separate accounts of this were forthcoming—the respondents not being contracting parties kept no accounts themselves—it was very difficult to ascertain what their share was, and what the additional revenue was in respect of it. But although the problem which was pre-

sented to us was very intricate and difficult to follow, it is at least free from most of the difficulties that beset the other branch of the subject, the rise in the cost of working.

Now the amounts involved in each of Mr. Fells's three heads or classes of criticism on cost, that is, the amounts which must be deducted from the respondents' figures as to increased cost of working, if these criticisms respectively are justified, are as follows: (1) If his attack on the respondents' methods in calculating the rise in the cost of working the railway succeeds, the respondents' figure must be reduced by £61,000. This figure was given us by Sir Lynden Macassey, and was accepted by Mr. Foote, subject to this: Mr. Foote said that about £14,000 must come off it as Mr. Fells increased the respondents' figures by some such sum. But for my purpose, I may take the total figure, as the other item would have to be considered in connection with the third class, the adjustment of figures. (2) If his disallowances of the large items are justified the amount to come off will be £73,000. (3) The attack on the respondents' figures, calculations and adjustments amount to about £16,000—that is the difference between the combined sums in classes 1 and 2, which amount together to £134,000, and the £150,000 struck off the respondents' estimate of increased cost by Mr. Fells. This £16,000, as I have said, includes many comparatively small items which have been disallowed, not involving serious questions of principle.

I have thought it desirable to dissect the figures in this way because if I am to deal with the voluminous accounts and figures at all in my judgment, as I think it is necessary I should, the only satisfactory way of doing it which I could present to myself is this: to get at the questions of principle which were involved in Mr. Fells's criticisms and see what they are, and classify them so far as possible, and then see what effect each class has on the respondents' figures. To deal with the mass of figures otherwise would be very difficult. If some of the large items are properly disallowed, then, even

if the respondents' estimate of additional revenue stands, the margin will, of course, be very seriously reduced, and an important question which Mr. Foote has raised as to the meaning of section 1 (1) (d) of the Act will arise. I will state now what it is. His contention is that the sub-section precludes the respondents from throwing on to their exceptional rate traffic a larger proportion of the whole increase of cost than the exceptional rate traffic bears to the whole traffic, and he contends that if the applicants can reduce the respondents' figure for increased cost to a substantial extent, or if he can increase their figure for additional revenue to a substantial extent, the respondents cannot justify the 4 per cent. increase, because they will have placed more than the proper proportion upon the exceptional rate traffic. The respondents deny this. But if Mr. Foote is right, it may be necessary to consider the figures more in detail than would otherwise be necessary.

Now in the ordinary course I should deal first with the question whether the applicants' attack on the respondents' method of calculating the increased cost of working the railway is well founded, and deal with the other classes of criticism in their proper order. But I propose first to deal with a figure which I have already mentioned, namely £2,577, which is a sum which has been attributed to goods traffic but which Mr. Fells says should be attributed to passenger traffic, and I do so for this reason. Mr. Fells's mode of dealing with it and arriving at his result, namely, the subtraction of £2,577 from the respondents' total figure for increased cost of working, illustrates very strongly the principle which he has followed in dealing with the whole problem with which he had to deal. It is typical of his criticisms generally, and as an illustration of his general method it will, I think, be convenient to take this item first. It is moreover an isolated item which he deals with first, and although logically it would fall within what I have called the third class of criticisms, I propose to deal with it in this way. The judgments in the

Great Northern case proceeded upon the basis that the railway company would succeed in justifying the 4 per cent. increase if, without attempting to "work out figures with exactness," as the Midland Company said, they showed by reasonable estimates and calculations that their additional revenue was not more than was reasonably sufficient to meet the increased cost of working the railway, excluding passenger traffic. The increase of 4 per cent., the Court said, was shown in that case to be "reasonable after allowing a considerable margin for errors." The respondents here, acting on precisely the same lines as the Great Northern Railway Company in that case, have with great care framed their estimates and calculations upon the materials at their disposal and arrived at a result which also allows a considerable margin for error. If Mr. Fells can show that there have been some real errors in their method or figures, or that some assumptions they have made are unreasonable as, for example, that their selected week is not a fair average week, or that they took a clearly incorrect ratio between goods and passenger traffic, such criticisms would be relevant and valuable. Mr. Fells has raised some questions involving matters of principle, in disallowing certain large items. But throughout his tables there is unfortunately to be found an attempt to make criticisms and work out calculations in support of them so refined and minute and of such meticulous nicety, the correctness of which moreover depends ultimately on hypotheses which cannot really be verified, as to lose all trace of that broad kind of treatment which is essential, if the problem is to be dealt with on the lines approved by the Court in the Great Northern case.

Now I will deal with the figure £2,577. Mr. Fells is endeavouring to show that the respondents have attributed to goods traffic items of cost which ought to have been attributed to passenger traffic. He does it in this way. The company have of course to haul coal for the purpose of its being used for the conveyance of passengers in passenger trains, and it also has to haul merchandise for the same purpose. The coal

and merchandise are hauled by goods trains, a truck of coal or a truck containing merchandise being attached to an ordinary goods train. No special service of trains is run for this purpose, but opportunity is taken of utilising a goods train hauling coal for this purpose. Mr. Fells says that part of the wages paid to the goods train driver and the other men employed in connection with the goods train is really a sum of money paid for passenger traffic and that the whole amount so paid ought to be calculated and the amount allocated to passenger traffic which no doubt the respondents have not done. Now the respondents admit that some allowance ought strictly to be made for expenses which really belong to passenger traffic, though they may take the form of wages paid to employees who work a goods train. Mr. Quirey, the accountant called by the respondents, gave as an instance wages paid to a railway servant for examining wagons which are used for the benefit of passenger traffic, a merely trifling sum so far as those figures are concerned. But it was pointed out that so far as this haulage of coal is concerned, contra services are rendered by passenger trains to the goods train service, *e.g.*, in carrying goods train servants and the staff daily to their work and back from their work, carrying money and wages for goods train servants, carrying clothes, etc., and the respondents in their estimates had treated the one as roughly balancing the other. The real question, I think, was, was this a reasonable view? If the balance is in favour of passenger traffic benefiting by services rendered by goods train servants it cannot be large, and it is impossible to quantify such balance. But Mr. Fells omits the services of the passenger to the goods service altogether, and proceeds to calculate with remarkable precision what the services of goods to passenger trains in hauling coal, etc., were, and he does it in this way. He extracts from the accounts what he considers to be the total amount of coal and merchandise carried by the company for its own use. He then seeks to find the increased cost which the respondents have incurred in carrying this quantity

of coal and merchandise.³ He gets at this by a series of elaborate and abstruse calculations based upon his figure for the total annual increase attributable to goods traffic before he deducts the £2,577, namely, £87,564. These calculations involve working on a decimal of a penny of six decimal figures, .887821 of a penny, as representing the increased cost per ton of goods train traffic for merchandise, and .232867 as representing the increased cost per ton of goods train traffic for minerals. Having got this increased cost per ton, he calculates by means of these decimals the increased expenditure on the conveyance of the merchandise and coal for the company's own use, and arrives at these figures: Merchandise, £2,440; coal, £1,855; total, £4,295. He then takes the proportion which he assumes to be correct which goods traffic bears to passenger traffic, and allowing 60 per cent. to passenger and 40 per cent. to goods traffic, he arrives at the figure £2,577 as being the sum which should be attributed to passenger traffic in respect of this coal and merchandise, and this sum he deducts from the respondents' estimate of the rise in the cost of working the railway excluding the cost of carrying and dealing with passengers. Now if, to say nothing of the other steps in his calculation, his hypothetical ratio of 60 per cent. for passenger and 40 per cent. for goods traffic is wrong, the correctness of his tables is destroyed. It is a little strange that in some of his tables he has exactly reversed the ratio. In the "Stores" account, for example, he has taken 40 per cent. for passenger and 60 per cent. for goods traffic. He says one must take different ratios for different departments according to the subject matter with which you are dealing. He attempted to justify the high figure which he gives in this table to passenger traffic by a singularly unconvincing explanation in answer to Question 2745. In my opinion, the kind of criticism which this table illustrates, which depends on the assumed correctness of hypotheses and on such minute fractional calculations (ignoring also as it does the other factor I have mentioned, namely, the services

rendered by passenger to goods trains) is really valueless. If Mr. Fells had asked himself the question which he should have asked; have the railway company in justifying the 4 per cent. increase acted reasonably in not taking into account under the circumstances the cost of carrying coal and merchandise carried for passenger train use, ascertaining as he could easily have done how the company dealt with this question of services rendered by one class of traffic to the other, he never could have prepared this elaborate table, and made these minute calculations. The table is, in fact, vitiated by another and quite different defect. In working out his figures he did not treat the two columns which he was comparing alike. He treats minerals differently with regard to the inclusion or exclusion of coal in different columns. He includes Tilbury mileage in one column but excludes it in another. Mr. Quirey pointed these errors out and said that if the defects were corrected, Mr. Fells's figure £2,577 would be very greatly reduced. I will not pursue this item further. I think that we must neglect the figure altogether and treat the criticism as wrong in principle and the result as entirely untrustworthy.

I now come to the criticisms which the applicants on Mr. Fells's evidence make upon the respondents' tables and calculations, and taking them as I have sub-divided them, I deal first with the attack that is made upon the method which the respondents have adopted in calculating "the rise in the cost of working the railway" owing to the improvements. The applicants contend that the respondents' method of taking the cost of the work in each department for the selected week and ascertaining what it cost to do the work that was in fact done and what it would have cost to do the same work under the old conditions is wrong. Mr. Fells corrects it in this way. I will take, as an illustration of the method which Mr. Fells says should be followed, his revision of the respondents' estimates of the increased cost for their selected week of the work done in the Engineer's Department. The respondents,

dealing both with their Midland and Tilbury systems, find on their method that the increase of wages for a week was £964. That they multiply by $52\frac{1}{6}$ and get at the figure for the year, the result being £50,289. I need not complicate the matter by adding, as the respondents had to add, the other items of increased cost, as I am discussing method and not figures. Now Mr. Fells does this by way of correction. By a series of complicated calculations he alters the figure £964 to £692, which he multiplies by $52\frac{1}{7}$ th. Whether this correction of the multiplier was a reasonable one to make, considering that it is no more accurate—indeed not quite as accurate—as the company's multiplier, is perhaps not worth considering. Sunday working is about equal to a quarter of a week day's working, and one can only arrive at an approximately right estimate. Mr. Foote abandoned the correction, as he truly said that the result was 'trumpery.' Mr. Fells gets at his figure £692 by deducting £245 from the company's £937, and he gets at the £245 in this way. Dealing first with the selected week in 1913, he ascertains what the engine miles run were, and dividing the company's figure for wages for that week by those engine miles he finds that the expenditure per train mile was 2.991d. He then deducts the expenditure per train mile in respect of the railway company's estimated increase in wages for that week, and arrives at the reduced decimal 2.747. He then goes through the same process for the corresponding week in June, 1911, the week ending June 29, and gets at the expenditure per train mile based on the wages paid for that week, 2.811d. Then, by a series of calculations and comparisons, he says he finds that the company's estimate of expenditure for the selected week exceeds their actual week's expenditure by £245. The whole basis of his calculation is the comparison between the cost per train mile in June, 1913, with that in June, 1911. This process he repeats in respect of the other departments of the respondents, or those to which in his view it is applicable. Is this corrected method right? Is Mr. Fells's criticism of the

respondents' method right? In my opinion it is clearly wrong. It is in distinct violation of the principle laid down in the Great Northern case. I have already cited what Lord Cozens-Hardy said:¹ "The company deliberately omitted to furnish any such evidence as would be necessary to justify an increase under the Act of 1894, based in some form or other on a comparison of two periods, and in our opinion they were right in so doing." Mr. Fells, in spite of this, insists on comparing the two periods, and he contended in his evidence, when asked to justify it, that one must take the alteration of working conditions in the two years into consideration and consider the cost per ton per mile in each year necessarily for the purpose of comparison. Mr. Whitehead, on behalf of the applicants, in his argument said that Mr. Fells "endeavoured to ascertain rightly or wrongly what would have been the cost per train mile in the one year as compared with the other." In my opinion the whole of this criticism and the whole of Mr. Fells's tables which are based upon it are wrong, and must be rejected. I do not think that it is open to us, even if one took a different view from that which I do take, to entertain the correction after the judgment of the Court of Appeal. That judgment in fact affirmed the view which I had expressed, with regard to comparing periods. But I would add this. I pointed it out during the argument. If Mr. Fells is right, if one must take the alteration of working conditions in the year 1913 as compared with those in 1911 into consideration, how can the company be justified in continuing the 4 per cent. increase through the subsequent years without fresh calculations for each year? If Mr. Fells is right, they must do the same for the year 1914 and every succeeding year, and we are not in a position to say with any certainty that the respondents were justified in continuing the 4 per cent. increase in any one of those years. His calculations throw no light on what is a proper increase to make in

those years. The amount of the increase which a railway company are justified in making must according to him change every year. It is quite plain that this is not what was contemplated. What was contemplated was that improvements once made would not be withdrawn, and that if the amount of the resulting cost was ascertained in the first year, after the improvements were made, and no more increased revenue was obtained than was reasonably required to meet it, the company would be justified in continuing to charge the increased rate. The matter was so treated in the Great Northern case.

I cannot pass from this question without referring to a remarkable mistake that Mr. Fells made in his calculations, apart from the defect in his method. He did not apparently observe that the corresponding week which he took in June, 1911, for the purpose of his comparison, instead of being a fairly representative week, was an entirely abnormal one. It was Coronation week, and in that week the company's depots were closed for two days in London and one day in the country. The train miles run that week were consequently very much below the average. His figure for the week's train miles in that week was 877,364. The average number was over 905,000. The result is that his estimate of the cost per mile in 1911 was absolutely erroneous and misleading. In fact we were told that if the respondents had worked on his method and taken the correct number of miles, their figure of increased cost of working would have been larger than it actually is. His tables and evidence are really worthless so far as this part of the case is concerned.

I now pass to the second of his heads or classes of criticism, and I will take first the question of cartage, the large disallowed item in the traffic department. The sum struck out by Mr. Fells, owing to his disallowing this item, is approximately £27,000. What the applicants say about cartage is this. The business of collecting and delivering goods by road is not part of the working of a railway. It is a separate

business. The Act speaks only of "rise in the cost of working the railway," and "railway" as defined by the Act does not and cannot include that which is no part of the railway at all. Mr. Foote contended that although a railway company is, of course, entitled to charge for collecting and delivering goods if they render that service, the business it carries on in doing so is as distinct from the railway business in its strict sense as a steamboat or hotel business is which the company also may carry on.

Now, on this question again I think that the question is really concluded for us by the judgment in the Great Northern case. The charges for cartage were included there, and I referred to them in my judgment. Mr. Foote contends that the decision in that case is not conclusive of the question. Even assuming that that view is right, and treating the question as an open one, I entirely disagree with the applicants' contention. I do not think that the words "cost of working the railway" were used by the Legislature in this strict and narrow sense. In *Hall v. London, Brighton & South Coast Railway Company*, Mr. Justice Wills pointed out¹ that the definition of "railway" is not intended to be of universal application, but only where the context does not require a different interpretation. In ordinary circumstances the railway company quote rates for C and D conveyance. C and D rates are authorised by the company's Railway Rates and Charges (Order Confirmation) Act, 1891. The company are not compelled to cart, and a customer is not bound to accept and pay for cartage, but if charged and accepted it is part of the conveyance rate, and this Court can inquire into the reasonableness of the charge. The service, if rendered, is part of the railway service, and the business the company carry on when rendering it is part of their railway business. It differs fundamentally from the steamboat or hotel business which a railway company may be authorised to carry on, but

(1) *Ante*, Vol. V. at p. 37; 15 Q. B. D. at p. 540.

which no one according to the ordinary use of language would call part of the railway business. To collect or deliver the goods is incidental to the business of working the railway, which the steamboat and hotel businesses are not. In *Evershed v. London & North Western Railway Company*, Lord Justice Brett said:¹ "A railway company undertake to do more than merely carry the goods entrusted to them; it is impossible that this should be the only duty which is imposed upon them. As a necessary incident of carrying the goods they must both receive and deliver the goods." In my opinion, the words "cost of working the railway" in the Act of 1913 clearly include, in addition to the cost of working the actual railway itself, the cost incurred in rendering those services which are incidental to such working. I think, therefore, that the respondents are entitled under the Act to treat the increased cost of collecting and delivering the goods, resulting from the improvements that they made, as part of the rise in the cost of working the railway, and that the applicants are wrong in their contention that the cartage figures must be struck out.

The next item is the increased contribution to the Railway Clearing House in respect of wages, etc. This again was expressly dealt with and allowed in the Great Northern case. This matter is so clear in my opinion that I only propose to say that there is no foundation for the applicants' contention that the figure ought to be disallowed.

The next two items I will take together as they really involve the same question, subject to one point as to making up a deficit which I will refer to in a moment. They represent increased contributions made by the respondents—in order to improve the condition of employees engaged in clerical work, and who receives salaries—to the retiring allowances and the superannuation funds. Their purpose was to secure to this portion of their salaried staff the full payment of proper

retiring and superannuation allowances. With regard to the first, the supplemental retiring allowance, the railway company decided to give an additional allowance, bearing a certain relation to the salaries which were received, to their employees in question on retirement; and the monies were contributed for that purpose. With regard to the second, the company were aware that there was a serious deficit in the fund on which the superannuation payments would fall, and to which they were authorised to contribute by the Midland Railway (Superannuation Fund) Act, 1913. There was sufficient to meet the claims of those already on the fund, but not to meet future claims. They accordingly agreed to make additional contributions for the purpose of securing the full payment of the superannuation allowance.

Both these items of expenditure were disallowed by Mr. Fells. It was contended that if in fact they were "improvements" within the meaning of the Act, the increased payments could not be treated as an increase in the cost of working the railway. Mr. Foote especially contended that this was true of the Superannuation Fund. To make up a deficit, he argued, could not be said to be providing money to meet the cost of working the railway.

Now at first sight this argument appears to be at least plausible, but in my opinion it is not in truth sound. Both classes of expenditure were certainly "improvements in the condition" of the staff. And they were really as much part of the increase in the cost of working the railway, as if the monies were paid in the form of salaries and the men for whose benefit they were provided contributed monies themselves to the fund. If the staff who are paid salaries and who are engaged in clerical work which must be performed in order to work the railway receive such benefits by way of improvement in their condition, it costs more to work the railway by the sum so provided. It was, I think, conceded that if the monies were paid to the company on the terms that they should provide the necessary funds to meet the claims,

the monies so paid might be treated as part of the increased cost, and there is no difference in principle between monies paid in that way and monies provided by the company themselves to fulfil the same object.

A good deal of discussion took place as to what class of persons were properly treated as part of the "clerical staff" of the company. The improvements must be in the condition of the "labour and clerical staff." In the Great Northern case an arbitrary line was drawn, for convenience, at persons receiving not more than £200 a year. The respondents had fixed the limit much higher. Before us they contended that at the lowest £500 a year is reasonable. If one takes that figure, the respondents have put their figure for increased cost at too large an amount, and £700 or £800 must come off. It is impossible to say with any attempt at precision what class of persons are within, and what are outside, the description "clerical staff," drawing a line according to the amount of salary they receive. I think that the words should bear a liberal interpretation, and I certainly am unable to say that a person in receipt of £500 a year is in such a position that one could not describe him as on the company's clerical staff. The respondents are content with the limit I have mentioned, and I treat that as at all events reasonable. The extent of increased cost of working will, in respect of this item, have to be reduced by the sum I have mentioned.

The last item of this class is the company's contribution to the Pension Fund. I need not say more than this about it; that after the passing of the National Insurance Act, 1911, the railway company's Friendly Society was proposed as an approved society, and the company utilised the society and its funds in order to provide pensions and give additional benefits to future members. The further yearly contributions which they made to the fund for this purpose they claim to treat in the same way as they treat the further contributions to the Superannuation Fund. I need not repeat what I have said in reference to these contributions. They depend on the same

principles, and I think that these payments also are properly treated as increasing the cost of working the railway.

I now come to the third class of criticisms, that which relates to calculations and figures and adjustments of figures, and I only propose to refer, and that very briefly, to one or two of the larger items. I will take first the payments made in respect of the "guaranteed week." This refers to an arrangement which was made in pursuance of an award by which men who were employed for part of a week had the whole week's employment guaranteed to them. The applicants, through Mr. Fells, contended that these payments were counted twice over, and they claimed to make a large deduction by reason of the alleged mistake. This was quite a misapprehension and was disproved by the respondents. There was no such mistake and the deduction was not justified. Another item objected to was what was called "manufacturing orders," an item in the chief mechanical engineer's department. Mr. Fells claimed to deduct a sum of over £1,000 in respect of this item. The company, instead of purchasing what they require, *e.g.*, for the purpose of repairing or making their plant, locomotives, etc., manufacture a great many things themselves. They do not always use them at once. They often keep them until they are required. Mr. Fells admitted that if the articles are used at once the cost of manufacturing them is properly debited to the cost of working the railway, but he said that if the manufactured articles are taken into stock they form part of the company's stock and cannot be so treated. I entirely fail to follow his criticism. He took the purely arbitrary period of a week, and said that if the things were not used within a week they ought to be treated as taken into stock. It can make no possible difference whether an article is made when it is immediately wanted or whether it is made a short time before it is wanted. If the company expend money in making it and they use it to work their railway, the expenditure is equally part of the cost of working the railway, whether it is

used at once or not. This is a hypercritical objection in my opinion, and there is no foundation for it.

The reduction in the respondents' figure for police, which involves over £2,000, is a singular example of Mr. Fells's criticisms. The respondents employed seventy-two more policemen in 1913 than they did in 1911. Mr. Fells only allows for thirty-six, not because the company did not employ seventy-two, but because comparing the hours worked in 1913 with those worked in 1911 he considers that the company ought only to charge for thirty-six. I say no more as to this than that the criticism is entirely groundless.

There was another item which was referred to as "Hay-making." The respondents' men in charge of the permanent way have, in order to maintain it, to cut long grass. The respondents treat the cost of doing this as part of the cost of maintaining the way. So it clearly is. Mr. Fells contended that it ought to be treated as a profit-making business of hay-making. There is no ground for this criticism. Any profit that is made goes into the accounts, but the additional wages paid to the men form part of the increased cost of working the railway, whatever the actual labour may be which has to be paid for for the maintenance of the permanent way. Mr. Fells made a singular mistake in treating the sum expended for haymaking in June as a representative sum paid every week in the year, and calculated the sum to be deducted on that footing. If the principle he was contending for had been right, his figures were strangely wrong. I am not suggesting, of course, that it was other than a mere oversight, but it did not add to the value of his tables.

I do not propose to go further into this part of the case. The items which remain, and which I have not dealt with in the class of criticism I have been considering, amount only to a few thousands of pounds. They have not all been really discussed. They cannot, in my opinion, affect the result, unless the applicants can substantially increase the respondents' figure for additional revenue, and unless also

they are right in their contention, on the construction of section 1 (1) (d) of the Act, that the "exceptional rate" traffic can only be made to bear a certain proportion of the increase of cost of working the railway. If the applicants can make good both of these contentions, it would no doubt be necessary to ascertain what is the total amount by which the respondents' margin is to be reduced.

I now come to the last question on the figures, namely, the additional revenue. Mr. Fells says that the respondents' figures must be increased by approximately £33,000. As I have said, the question in controversy is substantially this. Have the respondents dealt correctly with the "through through" traffic, *i.e.*, the traffic which both starts and terminates on the lines of other railway companies but passes in the course of its transit over the respondents' railway.

The respondents, having no accounts of this themselves, had to obtain from the Railway Clearing House the best information they could to enable them to ascertain what their receipts were in respect of this "through through" traffic. The Railway Clearing House do not calculate the proportions or shares of the different companies in the receipts for through traffic of both classes with what Sir Lynden Macassey called "meticulous accuracy," but, dealing broadly with the question, they arrive at what they consider a fair division, and leave the several companies to correct it if it is wrong. Now it is obvious that if the respondents could ascertain, first, what their share in the receipts for through traffic plus "through through" traffic for the year was, and, secondly, what the ratio was between the two classes, in other words what proportion the "through through" bore to the through traffic, and if they could also ascertain what their through traffic alone was for the year, the main part of the problem was solved. And that is really what they did ascertain on the best available materials. The Clearing House was able to and did give them their share in the receipts for the through plus the "through through" traffic, and also what the ratio was

between the two classes of though traffic, for two months, November and December, 1913, and the company were able to and did ascertain what the through traffic alone amounted to for three selected representative days. By multiplying each by the proper multiplier they got the respective figures for the year. They went through these processes, and arrived at the approximate amount of their receipts for "through through" traffic for the year. But that did not solve the whole problem without a further calculation. The through traffic which passed over their line on the three days included both traffic which would be, and traffic which would not be, subject to the 4 per cent. increase. In other words, it included both class rate traffic and exceptional rate traffic, and in order to see what additional revenue was derived from the 4 per cent. increase on through traffic, the respondents had to calculate it or estimate it by working on the proportion which the latter bore to the former. And, taking what they considered to be the true proportion, they arrived ultimately at the approximately correct figure.

Now it is difficult to see how a more reasonable method could be adopted of ascertaining what sum should be added to the additional revenue in respect of the "through through" traffic. Of course, the calculation does not pretend to be exact. It is impossible to get an exact figure. The materials do not exist for arriving at it. But as a reasonable estimate, assuming the figures are correct and that the periods of two months and three days respectively are fairly representative, I cannot, as I say, see how a more reasonable method could have been chosen. It was the one chosen and acted upon by all the railway companies. It was the one chosen and acted upon by the Great Northern Railway Company in their tables in the Great Northern case. But Mr. Fells attacked it in much the same way, and following much the same lines as those on which he acted throughout his tables. He made an abstruse calculation of the figures by way of revision which is set out on page 165 of his tables. In order to understand this

table and compare his process with that of the respondents we had to deal with figures and calculations which were singularly complicated. It was through the remarkably lucid and able exposition of the learned counsel on both sides that one was able to understand this difficult part of the case. It was pointed out that Mr. Fells had made an unfortunate mistake in dealing with this position, a mistake similar to one which I have mentioned before. He had in two of his columns, one representing tonnage and the other receipts, dealt with figures which ought to have been but were not of the same denomination, as if they were. "Through through" figures were included in one and excluded in the other. When this mistake is corrected, a very large part of Mr. Fells's reduction of the respondents' figure for additional revenue must come off.

But there is another mistake, a mistaken inference, which vitiates his calculations. One of his criticisms was this. He found that the average rate per ton for the three selected days was in excess of the average for the year, and he argued that if the respondents' ratio between traffic which did and traffic which did not become subject to the 4 per cent. increase was right, an exceptionally large proportion of the higher rated class traffic must have passed over the railway in those three days. That, of course, would mean that the amount of exceptional rate traffic, and consequently the amount of additional revenue which the respondents had taken as correct, was too small. The inference was entirely unjustifiable. In the first place, it is impossible to infer, from the amount of receipts, what the tonnage would be, or, from the quantity of tonnage, what the amount of receipts would be. Tonnage and receipts do not bear a uniform relation to one another. Class rate goods vary enormously as regards receipts, and the same amount of tonnage in two different days would produce a very different amount of receipts. But many other causes would, as was pointed out, explain the excess that he had noted. If the traffic was a C and D traffic, or if it was hauled

a longer distance on the one day than another, the difference would or might be accounted for. I do not propose to go further into this item. I agree with the expression which, I think, Sir Lynden Macassey used in speaking of Mr. Fells's figures, that it was a "distorted calculation." The respondents, as I say, have dealt with the problem exactly as the Great Northern Railway Company had done, and I think that they adopted a reasonable method and arrived at a reasonably correct result. I see no ground for saying that they have made any mistake in their calculations or figures. I come to the conclusion that Mr. Fells's criticism on this item also fails.

Before passing to the consideration of the question of construction of section 1 (1) (d) that Mr. Foote raised, I ought perhaps to say that in this case, as in the Great Northern case, it was not proved that any economies were effected which ought to be taken into consideration. Indeed, I think that what one of the witnesses said was correct, that if any economy in labour was effected by the improvements it would automatically appear in the wages pay sheets, but in any case none was proved in fact.

There remains only the question of construction of section 1 (1) (d) of the Act. As I have said, Mr. Foote contends that the exceptional rate traffic on which the whole of the 4 per cent. increase of rate is imposed ought not to be made to bear more than its own proportion of the increased rate, *i.e.*, its fair share having regard to the proportion which it itself bears to the whole traffic. He says that that is what the subsection means when it says that the proportion of the increase of rates or charges allocated to the particular traffic with respect to which the complaint is made shall not be unreasonable. If that view is right, if the class rates are up to their maximum, which a large part of them substantially are, a railway company could not raise the whole sum which the Legislature enabled them to raise in order to meet the rise in the cost of working. In my opinion it is clearly wrong. I think that

the suggestion which Lord Terrington made during the argument, namely, that "traffic" in this subsection refers to the class of goods, that is, the particular industry in which the complainant is interested, is right, and that the subsection was so framed as to prevent one trader being unduly burdened by the increase of rates that was made. The exceptional rate traffic applies practically to all classes of goods, to all industries in fact. The companies in effect curtailed the special advantages that all traders received by having goods carried at exceptional rates. No complaint is made here that one industry or one class of goods has been unduly burdened, and there is no evidence of any hardship. Mr. Foote based his argument on what I said in my judgment in the Great Northern case, where I referred¹ to the margin that the company had left unburdened by the 4 per cent. increase and to the ratio between the increased cost of working and the additional revenue, and compared it with the ratio between the exceptional rate traffic and other traffic. The language I there used does no doubt appear to support Mr. Foote's argument. But I gave that answer to the argument in that case as being a sufficient one on those facts. It was no doubt unfortunate that I did not deal with it without regard to the facts of that case, as I have thought it necessary to do in this case. The point does not seem to have been taken in the Court of Appeal. But Lord Cozens-Hardy, in delivering the judgment of the Court of Appeal, treated the whole of the margin of increased cost over additional revenue as "allowing a considerable margin for errors."² That view appears to me to negative any idea that the company had to bear that margin itself, and that the exceptional rate traffic could not be burdened with more than its proportion of the increase. In my opinion the contention of Mr. Foote is unsound.

For these reasons I think that the application fails.

LORD TERRINGTON: I have given careful consideration to the evidence and arguments presented to us in this case. The fundamental mistake made by the applicants' expert witness is that of ignoring the principles established by the decision of the Court of Appeal in the previous case and of continuing to criticise the case presented to the Court, as though no such decision existed. He admits that, assuming that decision to be law, the method of presenting the case adopted by the railway company is not incorrect, though he challenges the accuracy of certain of their arithmetical calculations and deductions. It would serve no useful purpose in these circumstances to go again through all the mass of detail, which has been dealt with so carefully and exhaustively by my Lord. I content myself by saying that, having had the opportunity of reading the judgments of my learned colleagues, I agree with them that this application fails.

MR. TINDAL ATKINSON, K.C.: This case has taken a long time to investigate. The Court has been overwhelmed by calculations and figures, for which Mr. Fells, the applicants' accountant, is mainly responsible, but when his figures come to be investigated by the light of the principles which this Court is bound to follow, it will be found that they afford no assistance of value in determining the real issue between the parties.

The bone of contention in this case is as to the reasonableness of a 4 per cent. increase on the exceptional rate traffic charged on the carriage of goods, and imposed by the Midland Railway Company on July 1, 1913. It should be borne in mind that this increase of 4 per cent. is not the isolated act of the Midland Company. It was fixed as the result of a joint conference of all the goods managers of the principal railways in Great Britain, the outcome of which was a compromise agreed to in order to prevent the confusion that would arise in the case of through rates, if differing rates of increase

were adopted by the different companies. This compromise was arrived at by men who were, above all others, qualified to judge of the effect which an all-round increase of wages would have on the cost of working a railway in relation to the carriage of goods. In the case of the Great Northern Railway, 4 per cent. on the exceptional rate traffic has been found to be a reasonable increase to meet the additional cost of working the goods traffic of that railway, resulting from the improved conditions of the labour and clerical staff. In that case the method adopted by the railway company was found to be correct, both in this Court and in the Court of Appeal. The Midland Company assert, and I find correctly, that the same method has been followed by them in the present case, in arriving at their figures.

The proper mode of arriving at the increased cost is to ascertain the cost of working the railway as worked in 1913 quite regardless of the way in which it was worked in 1911, then to apply the 1911 scale of wages to the 1913 work, and the difference will give the increase which the company can claim. This involves no comparison of either the wages paid or miles run or quantum of work done in some week in 1911 with wages and miles and work done in a week in 1913, but this is what Mr. Fells has insisted on doing, with the result that his criticisms on the company's figures are in my opinion quite useless. That this is a correct account of Mr. Fells's views is shown by his answer to a question as to a figure of £483, which is a vital figure which he gets in calculating the increase in the locomotive running department. The question was "and that is the figure which you did take over at page 65 and then averaged with the calculation based on train miles?" He says: "Yes, of course, that is working out the errors of principle that I think the railway company have made in not bringing in the conditions and mode of working in 1911 as compared with 1913," and later on in the same answer he says: "The fundamental fallacy of the railway company is in not considering how they would in 1913 have

done their work under 1911 conditions." And in reference to the traffic department Mr. Justice Lush asked: "Mr. Fells, could you, with reference to this figure, do as you have done with reference to the other, could you tell us what the essential difference is between you and the railway company with regard to this figure—you differ by a very large figure?" Answer: "Yes. Question: What is the underlying essential difference between the two methods by which you arrive at your results?—The underlying difference is in the fact that the railway company, I contend, have not eliminated a certain amount for the additional work done in 1913 as compared with 1911." He says later on that he has applied the same criticism to the locomotive running department—that he has relied on the difference between the figure in the contrasted weeks in 1911 and 1913. Again, he is asked a general question as to his criticism on the company's method of computation; he answers by saying that "the company have arrived at the increased cost by ignoring the conditions of service in 1911 and the mode of working in 1911 in comparison with the year 1913."

If Mr. Fells is wrong in this view, as undoubtedly he is, he has in my opinion no effective answer left to the company's figures in the three important departments—the engineer's department, the locomotive running department and the traffic department. These three departments furnish, according to the company's figures, a total increase of £164,466. To make Mr. Fells's figures still less reliable, he has taken for his week of comparison in 1911 a week in which, owing to Coronation festivities, there was a partial suspension of goods traffic, and consequently a fewer number of miles run than in an average week in that year, the average mileage for a week during the first six months in 1911 being 905,034 as against 877,364 in the week taken by him. This error, if uncorrected, would make the running more costly in 1911 than it really was, and so reduce the company's increase. When a proper average week is taken, it was shown that by

Mr. Fells's own method of calculation the company's claim ought to be considerably increased, as Mr. Fells admits.

Further, Mr. Fells's calculations are almost entirely worked out on the assumption that there is a fixed relation between wages paid and miles run, an assumption which has no foundation in fact. This by itself is sufficient to render his conclusions quite unreliable. Under these circumstances it is unnecessary for me to follow Mr. Fells through all the mazes of his tabulations and figures. Nor is it necessary in disposing of this case to deal with many of the smaller items in dispute. If the company's figure of £164,466 is correct, as I find it to be, representing the sum total arising in the three departments which have been mentioned, and if they succeed in establishing their claim founded on their contributions to the superannuation fund, retiring allowances and pension fund, which amount together to £45,428, they will have established a total of £209,894, and even if Mr. Fells is right, which I am satisfied he is not, in his estimate of the receipts from the 4 per cent. of £194,110, this would still leave an available margin in favour of the company of £15,784.

With regard to pensions to salaried and wages staff, the only objection made to the claim of the company, set out on Statement 10 of the company's yellow book, was that it included employees who did not properly come under the head of clerical staff. The point was adjusted during the hearing by the parties agreeing to an income limit of £500 per annum, with the result of reducing the company's claim on this and the succeeding item by £763.

With regard to Statement No. 11: "Pensions to salaried staff," this amount represents an additional $1\frac{1}{2}$ per cent., which the company have made on the increased wages of their clerical staff beyond the amount which they have personally paid in their statutory contribution to the superannuation fund. No question arose with respect to this item except the point that was settled by the arrangement already referred to. It will be

remembered that no objection was taken to either of these two heads of claim on the ground that such payments did not institute improvements in the conditions of the employees or form part of the costs of working the railway.

With regard to Statement 12: "Provision for pensions to wages staff," the applicants object to the whole sum claimed by the company on the ground that the provision is one made in respect of a part deficiency in the funds of the Railway Friendly Society. This society was founded for the benefit of the wages staff, and supported by joint contributions of the company and men. It provided for the usual benefits of a friendly society, namely, for cases of sickness, death, old age, etc. At a certain date coincident with the passing of the National Insurance Act, it was found on an actuarial valuation that the funds of the society, while sufficient to maintain the existing rates of pay to members already in the employment of the company and actual members of the society, were insufficient to meet the demands of future employees and members, and so the directors met and agreed, for the benefit of those who in the future would, under ordinary circumstances, come upon the fund, that they would increase their responsibility to the extent required for this purpose, the amount being the sum claimed of £28,729. No doubt, strictly speaking, the society was not in a financial position to meet its future liabilities, but in no sense did this provision partake of the character of a payment to wipe off an existing debt. It was in all essentials a voluntary undertaking by the company to provide for future claims by future members of the society to have the existing benefits continued to them. Mr. Foote attempted to discriminate between payments made for the future and those to make up a past deficiency. I fail to see that any such distinction can be drawn in regard to this item. It seems to me to be just as much an improvement, and part of the costs, as the two items conceded. Mr. Fells admitted that if all the existing claims on the fund were liquidated and a new fund was started by the company to provide for those who

might later become employees of the company, the latter would be entitled to claim the amount if paid in cash. One fails to see the distinction in this regard between cash and a liability to pay.

There is only one matter of importance that requires still to be considered arising on the figures, and that is the amounts realised by the imposition of this 4 per cent. increase. Mr. Fells endeavoured to show that, taking the three selected days in November and December, 1913, the company have realised the sum of £194,110 instead of the sum of £161,367. He based his calculations on the assumption that receipts can be accurately measured by the number of tons carried. It was pointed out to Mr. Fells that receipts could not be in strict relation to the tons carried, the rates varying with the length of the journey and the character and value of the goods carried, although the tonnage remained the same. If he is wrong in this, as in my judgment he is, the whole of his calculations on this point are beside the mark.

Further, Mr. Fells made the mistake of omitting to add in column 4, on page 165 of his black book, to the 212,819 tons, the tonnage due to the through traffic necessary to make the figures for the year comparable with those of the three days. Even if this addition is made, the result would merely increase the company's receipts from £161,367 to £167,158. It is not necessary to pursue the figures further; it is sufficient to say that I think the company's figures set out in Statement C of their book of accounts are correct, and that the increase due to the 4 per cent. advance amounts to no more than £161,367.

I wish to add a word with regard to the construction of the statute. Mr. Foote's point, as I understand it, is that it was never contemplated that the whole amount of the increase should be put on one part of the traffic only, but that it was intended that the burden should be spread over the whole, in proportion to the traffic carried, and that if, as in the present case, one portion of the traffic, viz.: the class traffic, is already rated up to the maximum, or practically so, the balance of the

increase must be borne by the shareholders. I see nothing in the Act which supports this view. The Act of 1913 was passed to relieve the company from the increased burden and to place it on the shoulders of the traders. The company are not bound to bear any portion of the cost unless they think fit to do so.

Mr. Foote, in support of his proposition that the whole increase cannot be placed on one part of the traffic only, called attention to the use of the word "proportion" in clause (d) of section 1 (1). That clause refers to an allocation "to the particular traffic with respect to which the complaint is made." That to my mind refers to the traffic or industry which is incident to the applicant's business, and if so the word "proportion" in that clause could only, at the most, be taken to show that the whole of the increase was never intended to be placed on any one industry. Subject to this, I think the company are entitled to put the whole or any part of the increase on any special section or branch of the traffic, limited only by their duty to show that such an allocation is not unreasonable. If this is the correct view, I think there can be no ground for saying that the conduct of the company in this case can be considered unreasonable. The only body available for the payment of the increase are the traders, and as the class rate traders are already rated up to the maximum, there is nothing for it but to call upon those who have hitherto escaped with lower rates to bear the burden of the increase.

I agree that this application fails.

Judgment was also entered by consent in favour of the London and North Western and Lancashire and Yorkshire Railway Companies.

Solicitors—Thickness & Hull, for the applicants; Beale & Co., for the Midland Railway Co.; M. C. Tait, for the London and North Western Railway Co.; A. de C. Parmiter, for the Lancashire and Yorkshire Railway Co.

FOSTER BROTHERS *v.* GREAT EASTERN RAILWAY CO.¹

Siding Rebate—Special Services—Meaning of “Conveyance”—Charge for Use of Wagons after Conveyance—Railway and Canal Traffic Act, 1894, s. 4—Rates and Charges Orders, 1891-2, ss. 2, 3, 5.

May 5, 6. July 22. December 15, 16, 17, 1919. March 30, 1920.

—The applicants, whose premises adjoining Cambridge Station were connected by private sidings with the defendants' railway, having claimed a siding rebate on the ground that the rates charged to them included charges for station accommodation and terminal services which were not provided or rendered, the railway company claimed to be entitled to make special charges for certain services rendered at or in connection with the applicants' sidings. These services included (*inter alia*) the shunting and haulage of wagons to the applicants' sidings from the reception sidings in which they were deposited by the train engine. It was contended by the railway company that conveyance ended at such reception sidings, although they could not deliver traffic intended for the applicants, or for traders using the station at that point. The Railway Commissioners decided that the railway company, being under an obligation to place goods in a position where the consignee can take delivery, conveyance in this case did not end until the wagons were placed in a certain siding adjoining the applicants' sidings, and that therefore the railway company were not entitled to make the special charge claimed by them in respect of such shunting and haulage.

Held, by the Court of Appeal, reversing the decision of the Railway Commissioners, that “conveyance” for the purpose of rates, although not necessarily completed when the train engine ceases to haul, need not coincide with contractual conveyance and does not necessarily extend to the point where the consignee can take delivery, and that the case should be remitted to the Commissioners with a direction that the proper test to be applied was whether under the earlier conditions of railway practice an independent carrier—as distinct from the railway company acting as conveyers—if he had been carrying on business at the station in question, would have done the work for which a separate charge was claimed or whether the railway company, acting as conveyers, would have done it.

Held, further, confirming the decision of the Commissioners, that a railway company are not entitled to make a separate charge in addition to the conveyance rate for the use of wagons in respect of the period intervening between the end of conveyance and the time when a charge for demurrage would begin,

(1) Before Lush, J., and Commissioners Lord Terrington and Mr. Tindal Atkinson, K.C., sitting at the Royal Courts of Justice, London.

and that the use of wagons paid for in the conveyance rate does not end until a reasonable time has been afforded to the consignee to take delivery.

This was an application under section 4 of the Railway and Canal Traffic Act, 1894, for an order declaring what were the reasonable rebates to be made from the rates charged to the applicants, which were the same as those charged to traders using the station, in respect that the defendant railway company did not provide station accommodation or perform terminal services for the applicants' traffic at Cambridge Station.

The defendants in their answer admitted that they did not provide station accommodation, but denied that the rates charged to the applicants included any charge for station accommodation or service terminals; alternatively they alleged that, if any such charges were included in the said rates, they rendered services and supplied accommodation at or in connection with the applicants' private siding which at least were equivalent to the services rendered and accommodation provided for traders using their Cambridge station. The said services and accommodation included storage, shunting, haulage of inward traffic after arrival at reception sidings to the private siding, and of outward traffic from the private siding to departure sidings, the services of two men on the private siding, clerkage and use of wagons off the railway company's premises.

The facts are fully stated in the judgment of Lord Terrington, and were shortly as follows:—The applicants carried on business as flour millers at Cambridge, in premises adjoining the defendants' railway, with which they communicated by means of private sidings. The trains conveying the applicants' inward traffic arrived on the through goods main lines to the east of Cambridge Station, where the wagons were detached and placed by the train engine on one or other of certain lines parallel to the main lines known as reception sidings; the wagons were then sorted and later hauled by a shunting engine over the main lines to the south

of the station, and then backed down into certain sidings known as the coalfield sidings on the west of the station, whence they were shunted into what was called the pink siding, which communicated with the applicants' private siding and which the applicants were granted by the defendants a licence to use under an agreement of November 27, 1916. The wagons were then brought into the private siding over a turn-table by the applicants' men and horses. The outward traffic was brought out in a similar way.

The substantial question for decision was whether conveyance ended after the inward wagons had been deposited and sorted in the reception sidings, as the railway company contended, or whether, as the applicants contended, the railway company were bound as part of conveyance to place these wagons in a place where the consignee could take delivery, which in practice was the pink siding.

A second point also arose as to whether the railway company were entitled to make a special charge for the use of wagons before and after conveyance as interpreted by them.

G. J. Talbot, K.C., and A. T. Miller, K.C., for the applicants. W. J. Disturnal, K.C., and Bruce Thomas for the defendants.

LUSH, J.: I have had an opportunity of reading the judgment of Lord Terrington, and I entirely agree with it.

LORD TERRINGTON: This is an application under section 4 of the Traffic Act of 1894 by Foster Brothers for allowances and rebates on the rates charged in respect of their traffic delivered to and received from their private sidings at Cambridge. The applicants are flour millers at Cambridge, and their warehouses and mills are connected by private sidings on their own land with the lines and sidings of the railway company by means of certain lines and a siding of the defendants (coloured pink on

the plan) of which the applicants are licensees under an agreement in writing dated November 27, 1916.

The applicants complain that the rates charged to them are the same as those charged to traders whose similar traffic is dealt with at, and who make use of, the station of the defendants at Cambridge, although the latter do not supply station accommodation or perform terminal services (other than sheeting) in connection with the applicants' traffic. The railway company admit the equality of the rates charged, and that they do not provide station terminal accommodation at Cambridge for the applicants, but they deny that they do any terminal services for traders at their station, or that any charge for such services is included in the station rates, and they contend that the services rendered and the accommodation provided by them at or in connection with the applicants' sidings justify the equality of the charge. By the above-mentioned agreement the user of the pink siding by the applicants was restricted to through traffic, and a right of user over it for their own purposes was reserved by the defendants.

It was also expressly stipulated by clause 5 of the agreement that the haulage to and from the pink siding from and to the applicants' premises should be performed by and at the expense of the applicants, but that the defendants should perform all the services necessary for delivering or receiving the trucks at the pink siding. It was also provided that nothing therein contained should affect the right of the applicants to any claim for allowance or rebate in respect of terminal charges.

The applicants' own siding connecting with the company's pink siding for traffic inwards is about 120 feet long, and will accommodate five trucks. Their private siding for traffic outwards (coloured green) connecting with the company's outward pink siding is about 400 feet long, and will accommodate about seventeen trucks. The traffic is worked as follows: The running lines into and out of Cambridge Station are due north

and south. The up goods line runs due south, and the down goods line from London runs due north. On each side of these running roads are lines parallel with them (coloured blue and brown), which the company designate as reception sidings. Trucks containing inwards traffic are detached from the train standing on the up or down running line, and are drawn off on to the lines coloured blue called "No. 1 siding" and "back goods road siding" respectively, and are there sorted. Those on the eastern blue line intended for station traders at Cambridge and for Foster's siding are then drawn off by the company's engine over Hills Road on to the western side of the station, and are pushed back into certain blue sidings situated in the goods yard at Cambridge Station. Traders receive advice notes of the arrival of their goods when they reach the coalfield sidings on the western side of the goods yard, and they take delivery of them there. The applicants' trucks inwards on the down line are sometimes backed direct on to the pink siding after being hauled from what are called the reception sidings; sometimes they are hauled from the coalfield sidings, and thence back on to the pink siding. Inward trucks, which come in over the blue lines on to the pink siding and then on to the applicants' own siding, when they reach the turntable are turned by the applicants' man and horse on their own turntable into their warehouses. When unloaded, they are either refilled with flour, or if for any reason they are not usable, they are sent out empty. Whether loaded or unloaded, they are turned again in the same way on the turntable, and are drawn out over the applicants' own green siding on to the pink siding. The inwards traffic is backed in this way over the pink siding by the defendants on to the applicants' siding five trucks at a time, three times a day. There is no night working of inwards traffic. All the outwards traffic is dealt with after six p.m. each day, when it is taken by the defendants from the applicants' green siding to the railway company's coalfields siding, and there marshalled for its destination.

In this case it is agreed that the amount charged in the station rate for station terminal, averages on the Pidcock principle (which both sides accept) 8.70d.; it is also agreed that the company do sheeting for the applicants on their outward traffic equal to .36d. The applicants' contention that the defendants in fact perform the service of loading and unloading traffic for traders at the station, and that a charge for this must be assumed to be in the rate, is not borne out by the evidence which was placed before us. The real issue in the case turns, therefore, on the nature and value of the services which the defendants allege that they render. These services are particularised under the following heads: (a) shunting to and from reception and marshalling sidings and coalfield sidings; (b) two men (checker and porter) wholly employed on the applicants' sidings; (c) clerkage and supervision; (d) maintenance of sidings used in connection with applicants' traffic, and other Cambridge traffic (coloured blue and brown on the plan); (e) provision of trucks before and after conveyance for the accommodation of the applicants at, or in connection with, their private siding. There was also a small item for signalman's wages which was not pressed. The claim for shunting is based on the assumption that the service of conveyance comprised in the tonnage rate ends as soon as the traffic of the applicants reaches the reception siding (No. 1 blue) in the case of the inwards traffic, or begins from the Back Road siding in the case of the outwards traffic, and that the marshalling done by the company's engine on the sidings adjoining the running road, and the haulage from thence to Hills Road, and across the points to and from the coalfield sidings, are not incidental to conveyance, but are, in the case of traders' traffic, part of a service of delivery which is comprised in the station terminal, and in the case of the applicants' traffic are services rendered at, or in connection with their private siding. This raises the question as to when the conveyance ends. Does it end, as the defendants contend, in case of the inwards traffic, when the trucks are detached from the train

standing on the running road, and then are shunted for marshalling into the reception sidings, or does it end when the trucks are placed in the position in Cambridge goods station where traders can, and do, take delivery of their goods? In practice that position is on the coalfield sidings.

The obligation of the company for their station rate is not only to carry, but to deliver the goods at the station, or at least to place the goods at the station in such a position that the trader can obtain convenient access to them so as to take delivery. The station-to-station class rate embraces in one sum the aggregate charges for conveyance, for terminal accommodation, and for terminal services the maxima whereof are fixed in the schedule to the company's Rates and Charges Order. The station rates in question were "exceptional" rates (that is to say, rates lower than the class rates), and were stated in the rate book not to include the services of loading and unloading.

It was conceded by the defendants' counsel that the marshalling done on the reception sidings was for the convenience of the company, and was a service incidental to conveyance and comprised in the tonnage rate; but it was claimed that all the services and accommodation, other than the marshalling after the detachment of the trucks from the train, were services which were not incidental to conveyance, but were, in the case of the station trader, attributable to delivery, and covered by the station terminal, and in the case of the siding trader were chargeable under section 5 of the Charges Order. This Court decided, in the case of *The Birmingham Corporation v. Midland Railway Company*,¹ that "conveyance" properly so called does not terminate until the siding points are reached, but that it is a question of fact in each case whether the service rendered is incident to conveyance, or due to request, express or implied, of the freighter. As was pointed out in that case, in determining whether a ser-

vice is incidental to conveyance, you must have regard to the whole circumstances, including the position of the siding, the configuration and area of the works, together with their internal requirements, and the volume of the traffic, in and out, which has to be dealt with. The facts of that case were special and peculiar, and the special services charged for were necessitated by the inadequacy of the works at the private sidings to accommodate the enormous traffic dealt with at such sidings. In this case it is clear that the defendants cannot fulfil their obligation of conveying the station traffic, and placing it in the position that the trader can receive it at the coalfield sidings, without for their own necessary convenience, owing to the configuration of their station and the way their sidings are constructed, doing the shunting and haulage backwards and forwards from the eastern to the western side of the station over the Hills Road points to the coalfields siding. Up to this point I think the service is one incident to conveyance which does not end until that point is reached. Similarly, I think it is the duty of the defendants to place the applicants' traffic on their pink siding. They have expressly contracted by their agreement to perform all the services necessary for delivering or receiving the trucks at this siding. The applicants admit that some extra shunting has occasionally to be done by the defendants, for which they are willing to pay. They also admit that they have to pay for the services of the two men claimed for, for certain clerkage services and for outward sheeting, and they assess the value of these services at about $2\frac{1}{2}$ d. per ton. I think the value of these services is underestimated by the applicants.

A large part of the defendants' claim for service is that for the provision of trucks before and after conveyance. It is difficult to follow the basis on which this charge is put forward as a service rendered "at or in connection with the siding." It does not purport to be a claim for demurrage or detention of trucks under sub-section 4 of section 5 of the Charges Order, under which a charge can only be made where

a reasonable time has elapsed for taking delivery after conveyance is terminated; but the charge is for the use of trucks between the arrival at the reception sidings and the period when demurrage would properly become chargeable under the terms of the Charges Order. This would be during the period when the defendants' obligation as carriers, and not as warehousemen, existed. The charge for conveyance by section 2 of the Charges Order includes the provision of trucks as an incident of such conveyance, and the additional charge is not, in my judgment, authorised by the terms of the Order, and is altogether untenable.

The defendants' counsel pressed strongly upon us that for the terminal accommodation and services amounting to 9d. per ton, the applicants obtained equivalent or greater services, as detailed in the foregoing particulars. For the reasons above indicated I think that some of these services are misconceived. On the other hand, the defendants appear to me not to have given sufficient consideration to the fact that all the applicants' traffic is loaded and unloaded on their own premises. By owning and utilising their own sidings they save the railway company a good deal of expense in not having to lay out money in providing additional accommodation for the handling of their traffic.

Taking all the circumstances into consideration, I have come to the conclusion that it would be just and reasonable to allow the applicants an allowance, or rebate, of 3d. per ton.

MR. TINDAL ATKINSON: I agree.

The defendants appealed.

Sir Lynden Macassey, K.C., W. J. Disturnal, K.C., and Bruce Thomas for the appellants.

“Conveyance” in the Railway Charges Order is not used in its popular sense. Regard must be had to the history of the railway system. There was an intermediate stage at which

the railway companies were conveyers but not carriers—that is to say, they provided the railroad, engine power and wagons, but the provision of station accommodation and the work of receiving, loading and other services incident to delivery or dispatch were undertaken by separate carriers, who charged the trader for these services. The railway companies then themselves undertook the work of these carriers, and it was held in *Hall v. London, Brighton and South Coast Railway Co.*¹ that they were entitled *prima facie* to make a separate charge for services rendered in that capacity—in addition to the charges made by them as “conveyers.” The Court of Appeal affirmed this decision in *Sowerby v. Great Northern Railway Co.*². The above cases were decided prior to the passing of the Rates and Charges Order, but the principle was followed in *Manchester, Sheffield, etc. Railway Co. v. Pidcock*,³ in which Sir F. Peel said that conveyance would include any work for which it is reasonable to use the train engine. Applying that test to the present case, conveyance will end when the wagons are deposited by the train engine in the reception sidings. This view was again followed in *Cowan v. North British Rly. Co.*⁴, and *Vickers v. Midland Rly. Co.*⁵. With regard to the claim to charge for the use of wagons after conveyance, section 2 of the Charges Order provides that the conveyance rate includes the provision of locomotive power and wagons, that is for the period of conveyance only, and therefore the railway company are entitled to charge for any subsequent use of wagons.

G. J. Talbot, K.C., and A. T. Miller, K.C., for the respondents.

The finding of the Commissioners as to when conveyance ends is one of fact from which there is no appeal. In the

(1) *Ante*, Vol. V. 28; 15 Q. B. D. 505.

(2) *Ante*, Vol. VII. 156.

(3) *Ante*, Vol. X. 150.

(4) *Ante*, Vol. X. 169.

(5) *Ante*, Vol. XI. 249.

same way the various cases cited by the appellants are decisions of fact only. The suggested rule that conveyance ends with the work done by the train engine cannot be applied in practice, and in any case shunting was not a service usually performed by the "carrier" as distinct from the "conveyer." In *North Staffordshire Rly. Co. v. Salt Union*,¹ Wright, J., held that a railway company could not charge beyond the conveyance rate for anything done on their own line which was properly incidental to delivery or collection to or from private sidings. A terminal station is defined by the Charges Order to be the place where loading or unloading is performed before or after conveyance, that is the private siding in this case, and therefore conveyance will continue until the siding is reached.

LORD STERNDALE, M.R.—This appeal arises out of an application by Foster Brothers, whom I shall call the plaintiffs, against the Great Eastern Railway Company, whom I shall call the defendants, for a rebate on the charges made to them in respect of their traffic delivered to and received from their private sidings at Cambridge. The application is made under section 4 of the Railway and Canal Traffic Act of 1894, which is as follows: " Whenever merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway company does not provide station accommodation or perform terminal services the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate."

The ground upon which the plaintiffs claim the rebate is that the rates charged to them are the same as those charged to traders in respect of similar traffic dealt with at Cambridge

Station, notwithstanding the fact that the defendants do not supply terminal accommodation other than shunting to the plaintiffs in respect of their traffic. The defendants admit that the rates charged to the plaintiffs and the other traders are the same and that they do not provide station terminal accommodation for the plaintiffs, but they deny that they do any terminal services for traders at their station or that any charge for such services is included in the station rates, and they contend that the services rendered and the accommodation provided by them at or in connection with the plaintiffs' sidings justify the equality of the rates.

The charge for services in connection with the sidings is based upon the Great Eastern Railway Company (Rates and Charges) Order Confirmation Act, 1891, section 5, which is in these terms: "The company may charge for the services hereunder mentioned or any of them when rendered to a trader at his request or for his convenience a reasonable sum by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. Provided that where before any service is rendered to a trader he has given notice in writing to the company that he does not require it the service shall not be deemed to have been rendered at the trader's request or for his convenience. (i) Services rendered by the company at or in connection with sidings not belonging to the company." It is also necessary to read sections 2 and 3 of the same Act. Section 2 is "The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train; and subject to the exceptions and provisions specified in this schedule includes the provision of locomotive power and trucks by the company and every other expense incidental to such conveyance not hereinafter provided for." Section 3 is "The maximum station terminal is the maximum charge which the company may make to a trader for the use of the accommodation (exclusive of coal drops) pro-

vided, and for the duties undertaken by the company for which no other provision is made in this schedule at the terminal station for or in dealing with merchandise as carriers thereof before or after conveyance.” The Commissioners, following the usual and convenient practice, dealt with the case as if they had before them, in addition to the plaintiffs’ application under the Railway and Canal Traffic Act, 1894, section 4, an application by the defendants under the Great Eastern Railway Company (Rates and Charges) Order Confirmation Act, 1891, section 5, which had been referred to them as arbitrators, and examined whether on the whole the charge made by the defendants was justified. They allowed the defendants some charge for services under section 5 of the Great Eastern Railway Company Act, but on the whole allowed a rebate to the plaintiffs. The defendants appealed on the ground that the Commissioners, in arriving at their decision, had misconstrued section 2 of the Great Eastern Railway Company Act in a manner which I shall state more fully later, and had in consequence proceeded upon a wrong principle in their determination of the facts.

The circumstances in which the question arises are so clearly stated in the judgment of the Commissioners delivered by Lord Terrington that I think my best course is to read it. “This is an application under section 4 of the Traffic Act of 1894 by Foster Brothers for allowances and rebates on the rates charged in respect of their traffic delivered to and received from their private sidings at Cambridge. The applicants are flour millers at Cambridge, and their warehouses and mills are connected by private sidings on their own land with the lines and sidings of the railway company by means of certain lines and a siding of the defendants (coloured pink on the plan) of which the applicants are licensees under an agreement in writing dated November 27, 1916. The applicants complain that the rates charged to them are the same as those charged to traders whose similar traffic is dealt with at and who make use of the station of the defendants at Cambridge,

although the latter do not supply station accommodation or perform terminal services (other than sheeting) in connection with the applicants' traffic. The railway company admit the equality of the rates charged and that they do not provide station terminal accommodation at Cambridge for the applicants, but they deny that they do any terminal services for traders at their station or that any charge for such services is included in the station rates and they contend that the services rendered and the accommodation provided by them at or in connection with the applicants' sidings justify the equality of the charge. By the above-mentioned agreement the user of the pink siding by the applicants was restricted to through traffic and a right of user over it for their own purposes was reserved by the defendants. It was also expressly stipulated by clause 5 of the agreement that the haulage to and from the pink siding from and to the applicants' premises should be performed by and at the expense of the applicants, but that the defendants should perform all the services necessary for delivering or receiving the trucks at the pink siding. It was also provided that nothing therein contained should affect the right of the applicants to any claim for allowance or rebate in respect of terminal charges. The applicants' own siding connecting with the company's pink siding for traffic inwards is about 120 feet long and will accommodate five trucks. The private siding for traffic outwards (coloured green) connecting with the company's outward pink siding is about 400 feet long and will accommodate about seventeen trucks. The traffic is worked as follows:—The running lines into and out of Cambridge Station are due north and south. The up goods line runs due south and the down goods line from London runs due north. On each side of these running roads are lines parallel with them (coloured blue and brown), which the company designate as reception sidings. Trucks containing inwards traffic are detached from the train standing on the up or down running line and are drawn off on to the lines coloured

blue called "No. 1 siding" and "back goods road siding" respectively and are there sorted. Those on the eastern blue line intended for station traders at Cambridge and for Foster's siding are then drawn off by the company's engine over Hills Road on to the western side of the station and are pushed back into certain blue sidings situated in the goods yard at Cambridge Station. Traders receive advice notes of the arrival of their goods when they reach the coalfield sidings on the western side of the goods yard and they take delivery of them there. The applicants' trucks inwards on the down line are sometimes backed direct on to the pink siding after being hauled from what are called the reception sidings; sometimes they are hauled from the coalfield sidings and thence backed on to the pink siding. Inward trucks which come in over the blue lines on to the pink siding and then on to the applicants' own siding when they reach the turntable are turned by the applicants' man and horse on their own turntable into their warehouses." Then follows a description of the handling of the trucks after they reach the railway company's premises, which is not necessary for this appeal.

The services in respect of which the defendants claim to charge are thus stated: "The real issue in the case turns therefore on the nature and value of the services which the defendants allege that they render. These services are particularised under the following heads (a) Shunting to and from reception and marshalling sidings and coalfield sidings." Then follow some other services not material to the question before us except one as to the provision of trucks, which raises a separate and subsidiary point to be dealt with later and the judgment goes on to explain the points made as to shunting in these words: "The claim for shunting is based on the assumption that the service of conveyance comprised in the tonnage rate ends as soon as the traffic of the applicants reaches the reception siding (No. 1 blue) in the case of the inwards traffic or begins from the back road siding in the case of the outwards traffic and that the marshalling done by the

company's engine on the sidings adjoining the running road and the haulage from thence to Hills Road and across the points to and from the coalfield sidings are not incidental to conveyance, but are in the case of traders' traffic part of a service of delivery which is comprised in the station terminal and in the case of the applicants' traffic are services rendered at or in connection with their private siding. This raises the question as to when the conveyance ends. Does it end, as the defendants contend, in case of the inwards traffic when the trucks are detached from the train standing on the running road and then are shunted for marshalling into the reception sidings, or does it end when the trucks are placed in the position in Cambridge goods station where traders can and do take delivery of their goods? In practice that position is on the coalfield sidings. The obligation of the company for their station rate is not only to carry but to deliver the goods at the station, or at least to place the goods at the station in such a position that the trader can obtain convenient access to them so as to take delivery. The station-to-station class rate embraces in one sum the aggregate charges for conveyance, for terminal accommodation, and for terminal services the maxima whereof are fixed in the schedule to the company's Rates and Charges Order. The station rates in question were 'exceptional' rates (that is to say, rates lower than the class rates), and were stated in the rate book not to include the services of loading and unloading. It was conceded by the defendants' counsel that the marshalling done on the reception sidings was for the convenience of the company and was a service incidental to conveyance and comprised in the tonnage rate, but it was claimed that all the services and accommodation, other than the marshalling after the detachment of the trucks from the train were services which were not incidental to conveyance, but were in the case of the station trader attributable to delivery and covered by the station terminal and in the case of the siding trader were chargeable under section 5 of the 'Charges Order.' Then he says: "This court decided in the

case of *The Birmingham Corporation v. Midland Railway Company*¹ that "conveyance" properly so called does not terminate until the siding points are reached, but that it is a question of fact in each case whether the service rendered is incident to conveyance or due to request, express or implied, of the freighter. As was pointed out in that case, in determining whether a service is incidental to conveyance, you must have regard to the whole circumstances, including the position of the siding, the configuration and area of the works, together with their internal requirements, and the volume of the traffic, in and out, which has to be dealt with. The facts of that case were special and peculiar, and the special services charged for were necessitated by the inadequacy of the works at the private sidings to accommodate the enormous traffic dealt with at such sidings. In this case it is clear that the defendants cannot fulfil their obligation of conveying the station traffic and placing it in the position that the trader can receive it at the coalfield sidings without for their own necessary convenience, owing to the configuration of their station and the way their sidings are constructed, doing the shunting and haulage backwards and forwards from the eastern to the western side of the station over the Hills Road points to the coalfield sidings. Up to this point I think the service is one incident to conveyance which does not end until that point is reached. Similarly I think it is the duty of the defendants to place the applicants' traffic on their pink siding. They have expressly contracted by their agreement to perform all the services necessary for delivering or receiving the trucks at this siding. The applicants admit that some extra shunting has occasionally to be done by the defendants, for which they are willing to pay. They also admit that they have to pay for the services of the two men claimed for, for certain clerkage services and for outward sheeting and they assess the value of these services at

(1) *Ante*, Vol. XIV. 24.

about $2\frac{1}{2}$ d. per ton. I think the value of these services is underestimated by the applicants."

The objection taken to this passage is that it is said to lay down as a matter of law that conveyance for the purpose of charges does not come to an end until the trucks are placed in a position where the consignee can take delivery, in this case the point where the railway company's sidings are reached, and that up to that point the service of shunting in the manner before described is a service incident to conveyance. The plaintiffs contended before us that the Commissioners did not intend to lay down any such rule of law and that the passages which I have read were merely statements of the reasons which led the Commissioners to a finding of fact as arbitrators that in this particular case conveyance did not end until that point. If it were only such a finding of fact, we could not interfere with it. Two questions therefore arise. Did the judgment state the proposition above mentioned as a rule of law? and, if so, was it right?

The passage to which most exception was taken, namely, that beginning, "Conveyance properly so called," is taken verbatim from a judgment¹ of Mr. Justice Lawrence in a case in which the facts were different, and I have considerable doubt as to whether the Commissioners intended to lay down a rule of law, and a reference to the case cited does not remove that doubt. We must however take the judgment as it is stated in the words before us, and looking at it in that way I think that it does on the face of it state the meaning of "conveyance" as one to be accepted generally, and so as a rule of law.

It is necessary therefore to consider whether, so stated, it is correct. The two main authorities upon which the defendants relied as showing that it was incorrect were the cases of *Hall v. The London, Brighton and South Coast Railway*², par-

(1) *Ante*, Vol. XIV. at p. 36.

(2) *Ante*, Vol. V. 28; 15 Q. B. D. 505.

ticularly the judgment of Mr. Justice Wills, and *Sowerby & Co. v. Great Northern Railway Company*.¹ In the former case Mr. Justice Wills defined the meaning of "conveyance" by a historical review of the connection of railway companies with the carriage and conveyance of goods. He showed that there were these stages and thus described them² . . . "Three states of things were from this point of view to be expected and to be provided for by legislation. The company might be merely the owners of a highway and toll-takers for the use of it by other people with their own carriages and locomotives. That state of things would be worked out by the railway company possessing the mere line of railway from end to end and by the persons making use of it buying or renting contiguous land whereon to keep their rolling stock and have their offices, availing themselves of the powers of section 76 of the Act of 1845 and getting on to the railway by means of sidings connected with the railway. A second state of things, as we know from the evidence in this case to which by the consent of the parties we are at liberty to refer, prevailed extensively for many years after the railway system was in full operation and for some years at least after the passing of the Act of 1845. The railway company provided the line and provided the engine and trucks, but they were not carriers. The large warehouses and sheds wherein goods were received, sorted, loaded, covered, checked, weighed and labelled, and trucks or carriages marshalled and prepared for convenient removal to their various places of destination—a corresponding work was done in respect of goods arriving from a distance—the staff of clerks, book-keepers, porters, workmen and horses necessary for these operations were all provided and maintained at the expense of the carrier and no portion of it fell upon the company. The company, on the other hand, as owners of the rolling stock for the use of which as well as of their railways they received pay-

(1) *Ante*, Vol. VII. 156.

(2) *Ante*, Vol. V. at p. 33; 15 Q. B. D. at p. 536.

ment, provided whatever accommodation they needed in order to keep in convenient proximity to the places where the carrier had his depots the necessary supply of rolling stock. The third state of things which might exist simultaneously with the second, or might be the one prevailing exclusively on a particular line, existed when the company were themselves the carriers of the goods, and when as carriers they provided the accommodation and performed the services above described.” He held that in the third case the charges for conveyance only covered the services up to the points where the duties of the railway company as conveyors ended and their duties as carriers began. He points out in the following passage that these charges are imposed according to a mileage rate, while many of the charges made as carriers could not be so measured. Then he says¹ “The charges of and incidental to “conveyance” as we have explained that phrase are properly measured by the mile of distance travelled over. The terminal services of station accommodation, loading, watching, checking and the like, have no common measure with the distance run and are the same, whether that distance be two or two hundred miles.”

This case came before the Court of Appeal in *Sowerby v. The Great Northern Railway Company*² and the judgment of Mr. Justice Wills was affirmed. The applicants appealed from so much of the judgment as decided that the defendants were entitled to make reasonable terminal charges in addition to the maximum rates for conveyance. Lord Halsbury said:³ “I confess if I had any difficulty about this case it would be to understand how it ever could have been contested. A railway company is carrying on a business divided into two classes of business. They are carrying by their trains from point to point; and they are carrying (by reason of the variety of goods they have to take and the places at which they have to be delivered) a quantity of goods which they deliver from the

(1) *Ante*, Vol. V. at p. 36; 15 Q. B. D. at p. 539.

(2) *Ante*, Vol. VII. 156.

(3) *Ante*, Vol. VII. at p. 169.

point at which the locomotive, by which the things have been conveyed, stops. I can quite understand that, as a matter of fact, the analysis of these two different classes of business, and the services and accommodation rendered in respect of these two classes of business, may sometimes be very difficult indeed, especially one which I instanced just now—the question of shunting and the use of railway sidings, for the purpose it may be, of facilitating what I may call locomotive railway business, and carriers' distribution business. I can very well imagine that a person who had to make that analysis with very great precision, might be in some difficulty to know how much to attribute to one, and how much to attribute to the other. But the principle seems to me to be as plain as anything can possibly be. They are permitted by law to carry on the business not only along their line, but also in connection with it, and as part of the same general undertaking by which they make profit—the business of distributing the goods which they so bring from distant points to the places where the different consignees intend that they shall be delivered. For that purpose they have to build stations both for the receipt and for the despatch of goods which are so entrusted to them. For those the tolls of the railway proper would be obviously inadequate and improper; and that they are entitled to make charges in respect of those things seems to me to be as manifest as anything can be. If Messrs. Pickford or Messrs. Chaplin and Horne did it in times gone by, and the railway company have succeeded to the business, why are not they, who are now performing the same duties that Pickford and Chaplin and Horne performed, entitled to make the gains and profits that those firms made when those firms were carrying it on as an independent business of their own? The question of quantum—the question indeed of analysis in respect of particular and individual things, is not before us; that is for the Railway Commissioners, or for their officers, to ascertain. But upon the question of principle I cannot for my own part entertain the least doubt in the world that the decision in *Hall's Case*

was right, and that Mr. Justice Wills's judgment is right; and that, as I understand it, is the only question submitted to us. We have, fortunately for us, not to go into the analysis of these things. We simply have to pronounce as a matter of law whether these expenses, if they are proved to be, in the language of the instrument itself, attributable to carriers' accommodation for dealing with merchandise traffic as carriers, are to be attributable to carriers' services and so on—for shunting, locomotive power, horses, staff and so forth—carriers' services in the sense in which those words are distinguished from the ordinary course of propulsion by the railway from one point to another. If, as a matter of fact, they can be so distinguished, it seems to me that the railway company, in their character as distributing or forwarding carriers, are entitled to charge something. I am content with saying that the judgment of the Railway Commissioners, to my mind, is manifestly right and ought to be affirmed."

Lord Justice Fry states the principle in the same way.¹ "It appears to me to be plain that the Legislature intended to divide the entire gross business carried on by the railway company under the powers of this Act into business of two kinds—the one, that which would have been done by a carrier, if a carrier had been doing the business as well as the railway company, and the second, that which would have been performed by the railway company, if there had been a carrier as well as the company. It seems to me that there was a sort of hypothetical carrier to whom you are to attribute a portion of the services rendered. Therefore the first enquiry is this: Would these services have been rendered by that carrier if he had been there? If Pickford or Chaplin and Horne had been carrying on the business at this station of transmitting the goods for the traders, would they have done this work or would the railway company have done it"? The reference to the depots or stations established by carriers, such as Pickford and Co. or

(1) *Ibid.*, at p. 174.

Chaplin and Horne, is taken from the judgment of Mr. Justice Wills in *Hall v. The London, Brighton and South Coast Railway Company*¹. The company there adduced evidence to the effect that in the early days of railway working there was a class of carriers of goods traffic (of which Pickford and Co. may be taken as an example), intermediary between the railway companies and the public, who performed and charged for all or most of the services mentioned in paragraph 12 of this case, and also in several cases provided at their own expense the station accommodation needed for the purposes of their traffic. It was proved, however, that this course of dealing never was universal, that where it existed it began to be superseded by the modern practice many years ago, and that Pickford and Co. (the only specific case of which any evidence was given) ceased to act as carriers by railway on their own account and have for many years been acting as agents only. These cases do, in my opinion, show that "conveyance" for the purposes of charging does not necessarily extend to the point where the consignee can take delivery, and that there may be a right to make additional charges for services which the carrier would have rendered in the second stage of the historical development described by Mr. Justice Wills in *Hall v. The London, Brighton and South Coast Railway Company*.¹ It is true that the greater part of these judgments is concerned with the right to charge in respect of the accommodation provided by a terminal station, but they do extend to conveyance to private sidings, and have been so applied in other cases. I think, therefore, that the judgment of the Commissioners, in the sense in which I read it, is too widely stated, and as that may have influenced their decision on the question of fact, I think that the case must be remitted to them.

But when I come to deal with the direction which the defendants ask us to give the Commissioners, very different considerations arise. The learned counsel for the defendants

(1) *Ante*, Vol. V. 28; 15 Q. B. D. 505.

formulated the direction for which he asked in two different ways, one general, and one adapted to this particular case. In the former, he asked for a direction that "conveyance" is confined to work for the performance of which it is reasonable to use the train engine; if this be adopted, it follows that any services rendered, after the train engine ceases to be used, are services to be charged for as rendered at or in connection with the siding. The request for this direction is founded upon the case of the *Manchester, Sheffield and Lincolnshire Railway Company v. Pidcock*.¹ The second form in which the direction asked for was put was, in a particular application of this principle to the case before us, as follows: namely, that "conveyance" means that "conveyance" stops from the time, as far as inwards traffic is concerned, when the traffic is placed by the train engine into the No. 1 reception sidings.

In order to accede to a request for a direction in either form it is necessary to accept the former principle as a proposition of law applicable to all cases; that is to say that "conveyance," for the purpose of charge, stops at the point where it is reasonable to cease to use the train engine. I am not prepared to accept it as such a proposition, and I have some doubts whether the case of the *Manchester, Sheffield and Lincolnshire Railway Company v. Pidcock*,¹ meant to lay it down as a general proposition; if it did, I cannot agree with it. The reasonableness of stopping the services of the train engine at a certain point may arise from the arrangements made by the railway company for the transaction of their general business as a railway company, and not in any way from their character of carriers, as distinguished from conveyers. If that be so, it seems to me that the conveyance rate would cover the transit up to the point at which the independent carrier, if there were one, would receive the goods, and that the haulage of them from the point where the train engine dropped the trucks to the point above men-

tioned for the purposes of the railway company would not be the subject of charge. This seems to me to be in accordance with the judgment of Lord Halsbury in *Sowerby v. The Great Northern Railway Company*,¹ when he says "We simply have to pronounce as a matter of law whether these expenses, if they are proved to be, in the language of the instrument itself, attributable to carriers' accommodation for dealing with merchandise traffic as carriers, are to be attributable to carriers' services and so on—for shunting, locomotive power, staff and so forth—carriers' services in the sense in which those words are distinguished from the ordinary course of propulsion by the railway from one point to another" and with Lord Esher's statement in the same case where he says² "That would leave the only enquiry to be, whether the charges which are made are properly incidental to the duty of a carrier as distinguished from the rest of the business carried on by the railway company." I think that the case of *The North Stafford Railway Company v. Salt Union*³ points in the same direction though the facts were different and the actual decision not in point. To take an instance, it was argued for the plaintiffs that the conveyance rate in this case covered at any rate the transit up to the defendants' goods sidings called the coalfield sidings and that the haulage from the No. 1 reception siding to these goods sidings was done by a shunting engine for the convenience only of the railway company, and would never have formed a part of the services rendered by a carrier in old days. This is a question of fact, and I offer no opinion as to whether it is right or wrong, but it is an illustration of the contentions that may be raised. I think that this was probably in Lord Terrington's mind when he referred to it in his judgment, and this gave rise to my doubt whether he intended to lay down any rule of law.

(1) *Ante*, Vol. VII. at p. 170.

(2) *Ibid.*, at p. 172.

(3) *Ante*, Vol. X. 161.

I do not see my way to go beyond the rule laid down in *Sowerby v. The Great Northern Railway Company*,¹ which I think may be taken as thus shortly stated by Lord Justice Fry: "If Pickford or Chaplin and Horne had been carrying on the business at this station of transmitting the goods for the traders, would they have done this work or would the railway company have done it?" It is not an easy question, because it involves the consideration of a state of things quite different from those at present existing and one that has long passed away. It may even involve the consideration of whether the carriers would for their business have constructed a station with such complicated arrangements as those at present existing.

It seems to me the position is this. Conveyance for the purpose of rates is the same under the Act of 1891 as when the cases of *Hall v. The London, Brighton and South Coast Railway Company*² and *Sowerby v. The Great Northern Railway Company*³ were decided. It may, or may not, coincide with the contractual conveyance, but it cannot be said as a matter of law that it does. The point at which it ends will be ascertained *prima facie* by the point at which the goods train detaches and deposits the trucks, but if they are so detached and deposited for the convenience of the railway company at a short point of that to which they as conveyers would have been bound to take them for the purpose of delivery to a distributing carrier in times when such carriers existed, a charge cannot be made for the haulage between these two points. I think this applies to station traders as well as to private siding owners, though they, as using the station, are liable to terminal charges to which sidings owners are not liable. I do not think that it offends against the principle laid down by Mr. Justice Wills that conveyance charges must

(1) *Ante*, Vol. VII. at p. 174.

(2) *Ante*, Vol. V. 28; 15 Q. B. D. 505.

(3) *Ante*, Vol. VII. 156.

be such as can be measured by a mileage rate; there still is a point to which it is measured, though the ascertainment of the point may be more difficult.

There is a separate and distinct point raised by the defendants with regard to a charge for the use of trucks. As I understand it, the point is this. The use of trucks is included in the conveyance rate, but the defendants contend that the use so given ends when conveyance ends and that the plaintiffs are liable to pay for the use of the trucks between that time and the time when a charge for demurrage would begin, as for a service rendered in connection with the sidings. I think there is no foundation for this claim. It is admitted that there is no precedent for it and I think that it is ill-founded. The use of trucks paid for in the conveyance rate does not, in my opinion, end until a reasonable time has been afforded to the consignee to take delivery of his goods, and when that reasonable time has been exceeded, demurrage begins. I think that the judgment of the Commissioners was quite right on that point. I think it is well to point out that in this case also we are dealing with a private siding owner and not with a trader who may use the terminal station during this time of taking delivery from the trucks. That point is not before us, and I have not considered it.

The result is that the case must be remitted to the Commissioners with the direction I have mentioned. It may not be much guide to them, but it is impossible to frame any formula which will apply to all cases.

The appellants must have their costs of the appeal.

ATKIN, L. J.: There is an appeal from a decision of the Railway and Canal Commissioners on an application by Messrs. Foster Brothers under the Railway and Canal Traffic Act, 1894, section 4. The applicants are owners of a private siding which connects with the respondents' railway at Cambridge Station. They claim a rebate from the rate charged to them in respect that the railway company do not provide

station accommodation. The respondents by their answer admit that they do not provide station accommodation, but allege that they render services at or in connection with the applicants' sidings at the applicants' request, and that they are entitled to charge the applicants for such services under section 5 of their Rates and Charges Order Confirmation Act, 1891. Though by the section any difference arising under it has to be referred to an arbitrator appointed by the Board of Trade, yet the Commissioners may be appointed as arbitrators, and it has been the usual practice of the Commissioners, where they have to adjudicate upon a claim for a rebate under the Act of 1894, to take into account the claims that might be made before them if appointed arbitrators under section 5 of the Act of 1891. It is a convenient practice and has received judicial approval, and no objection in this case was, or in my opinion could be, made to it.

The main question that arises is whether the company are entitled to charge for the haulage of the applicants' trucks to the applicants' sidings from the company's reception sidings, where they are in the first instance deposited after being detached from the goods train which hauls them to Cambridge Station. The applicants say that such charge is contained in the rate for conveyance which the company are empowered to charge under section 2 of their Act, alleging that conveyance continues until delivery at the applicants' siding. The company allege that the conveyance for which they are entitled to charge under this section ends at the reception sidings or at any rate at a point short of the applicants' sidings, and that the haulage from the point where conveyance ends to the sidings is a service rendered at the applicants' implied request.

It was contended before us that this dispute raises only a question of fact, in which case we should have no jurisdiction. I have no doubt that this contention is ill-founded, for the dispute involves questions of the construction of the company's Act of 1891 and of other Railway Acts. Indeed, a

very similar point has been before the Court of Appeal in *Sowerby v. Great Northern Railway Company*.¹ It would be impossible for any tribunal to determine the issue raised between these parties without determining the extent of the legal obligations imposed upon the railway company by section 2 of their Act of 1891 fixing the maximum rate which they may charge for "conveyance." The judgment of the Commissioners makes it plain that they took this view. They construed the word "conveyance," fortifying themselves by the authority of a previous decision in their Court, and in accordance with the view they took they disallowed this head of the company's claim.

What, then, is the meaning of "conveyance" as used in the section in question? If the word was used in reference to an ordinary contract of carriage by an ordinary carrier without any proof of special trade usage, I should have little doubt that it indicated an obligation to transport from the designated point of acceptance for carriage to the designated point of delivery, and in this particular case there was no dispute that the legal obligation of the railway company under their agreement with the applicants was to transport or haul or convey (in its ordinary sense) the trucks to the applicants' siding. But the question still remains whether the rate allowed in section 2 is intended to be the remuneration for performing the whole of that duty. It appears to me that we are bound by current authority to recognise that "conveyance," used in connection with railway rates and charges, has a special and limited meaning. I do not propose to read the judgment of Mr. Justice Wills in *Hall v. London, Brighton and South Coast Railway*.² The historical survey which he took in that case of the development of railway trade and railway legislation was based upon evidence which had been placed before the Railway Commissioners in that particular case, and had been made available to the public at large a few years before in the

(1) *Ante*, Vol. VII. 156.

(2) *Ante*, Vol. V. 28; 15 Q. B. D. 505.

report of the Select Committee on Railway Rates of 1882. In 1888, two years after the judgment in *Hall's Case*,¹ the Railway and Canal Traffic Act, 1888, was passed, by section 24 of which the railway companies were directed to submit to the Board of Trade revised classifications of merchandise traffic and revised schedules of maximum rates and charges applicable thereto, with the object of their being eventually submitted to Parliament and embodied in an Act of Parliament. This procedure was carried out and resulted in the uniform classification and to a less extent the uniform rates to be found in the various railway companies' Rates and Charges Orders Confirmation Acts of 1891-2, including the Great Eastern Company's Act in question. It is to the last degree improbable that after the judgment in *Hall's Case*¹ the various companies would have prepared their schedules of rates upon any footing than that laid down in that case, or that the Legislature would have used words in a sense inconsistent with the judgment in that case, without express provision to that effect.

In 1890 the same question arose in *Sowerby v. Great Northern Railway Company*,² in which the Court of Appeal treated the question before them as being substantially whether the decision of Mr. Justice Wills in *Hall's Case*¹ was right, and came to the conclusion that it was. The principle affirmed appears to me to be that, in construing an Act giving powers to a railway company to charge for conveyance, you are to remember that at one time railway companies acted only in the capacity of persons owning something analogous to a highway, and in that capacity were entitled to charge only for the haulage of vehicles upon that highway, leaving to independent carriers at the carriers' station the further duties that had to be performed before the vehicle was placed at the disposal of the consignee, namely, shunting, marshalling, checking, weighing, etc. At what precise point the

(1) *Ante*, Vol. V. 28; 15 Q. B. D. 505.

(2) *Ante*, Vol. VII. 156.

conveyance by the railway company ends is not in terms decided. We have, however, the guidance of Mr. Justice Wills and of Lord Halsbury. Mr. Justice Wills says in *Hall's Case*:¹ "The charges of and incidental to conveyance, as we have explained that phrase, are properly measured by the mile of distance travelled over . . . the line we should draw being that whatever is necessary for conveyance in the sense in which we have defined it—being all capable of being measured by reference to the distance travelled—is covered by the mileage rate." Lord Halsbury says in *Sowerby's Case*:² "I confess if I had any difficulty about this case it would be to understand how it ever could have been contested. A railway company is carrying on business divided into two classes of business. They are carrying by their trains from point to point; and they are carrying (by reason of the variety of goods they have to take and the places at which they have to be delivered) a quantity of goods which they deliver from the point at which the locomotive by which the things have been conveyed stops."

Sowerby's Case, though decided in the Court of Appeal in 1891, was not a decision upon the new statutory provisions of that year, but in 1896 the question arose between the owners of a private siding and a railway company under the Manchester, Sheffield and Lincolnshire Company's Act of 1892, in the case of *Manchester, Sheffield and Lincolnshire Railway Co. v. Pidcock*.³ There the judgment was delivered by Sir Frederick Peel, who, it may be noted, had taken the contrary view to that finally adopted both in *Hall's Case* and *Sowerby's Case*, but now was loyally accepting the view of the Court of Appeal expressed in the latter case. I need not refer to the facts, which are very similar to the present case. It is sufficient to say that the railway company's claim under section 5 of their Act was for services rendered in hauling trucks from their

(1) *Ante*, Vol. V. at pp. 36 and 37; 15 Q. B. D. at pp. 539 and 540.

(2) *Ante*, Vol. VII. at p. 169.

(3) *Ante*, Vol. X. 150.

reception sidings to the respondents' private siding. Sir Frederick Peel says:¹ "Now the question we have to determine depends, I think, not so much upon where in a general or common law view of a carrier's duties conveyance ceases in a contract of carriage, as upon the meaning the word "conveyance" bears as used in the Railway Companies Rates and Charges Orders Confirmation Acts, and the services to which the charges authorised by those Acts are respectively applicable. And first, the conveyance rate authorised by section 2 is the rate a company may charge for the conveyance of merchandise by merchandise train, and includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not otherwise provided for. The rate, therefore, is for conveyance by merchandise train, and this will include any work which is incidental to such conveyance and for the performance of which it is reasonable to use the train engine, as, for example, when at a junction with the main line of either a station siding or a private siding, the train has to pick up or throw off trucks, the work of hauling or shunting the trucks over the points at the junction and over so much of the siding as the keeping of the main line clear of obstruction may require." This judgment was concurred in by Mr. Justice Collins. The same construction of the scope of the conveyance rate was adopted in *Cowan v. North British Railway Company*,² a judgment delivered by Sir F. Peel and concurred in by Lord Trayner, and in *Vickers, Sons & Maxim v. Midland Railway Company*.³ In the latter case Sir F. Peel, at page 254, said: "The matter seems to turn upon whether the train by which the sidings traffic arrives conveys it as near to its destination as such a train on this particular portion of line can be reasonably expected to come and deposits it for delivery at the point best fitted for the purpose." Mr. Justice Wright

(1) *Ante*, Vol. X. at p. 157.

(2) *Ante*, Vol. X. 169.

(3) *Ante*, Vol. XI. 249.

did not differ from this judgment, and on appeal the Court of Appeal treated the dispute before them as one of fact, a view they could hardly have taken had they been dissatisfied with the construction of the Act placed upon it by the Commissioners.

I think that the result of these cases is that the determination of the extent of the conveyance rate involves questions both of law and fact. Applying the words of Lord Halsbury in *Sowerby's Case*:¹ The railway company "are carrying by their trains from point to point," one has to determine to what point. The goods must be conveyed to the station or place (used in a wide sense) where the unloading takes place, and the conveyance rate covers at least so much of the transit as is completed by the conveying train. The conveyance is for a transit which can appropriately be measured by a mileage rate. On the other hand it is not necessarily completed when the conveying train or the train locomotive ceases to haul. If *Pidcock's Case*² lays this down as a matter of law, it is too narrow. As nearly as possible, one must resolve the two functions of the railway company as conveyers and independent carriers, and without actually reconstructing hypothetical stations for hypothetical independent carriers, determine at what stage the company cease to act as conveyers and receive the trucks at the station as carriers. The trucks must be placed clear of the running lines; they may have to be placed clear of sidings which are substantially in use as part of the running system. Subject to the adoption of the construction set out above, in particular cases the question will be one of fact. The tribunal will bear in mind the weighty consideration that the rate is a mileage rate; on the other hand, they will see that the company act reasonably, and will not allow them to fix the conveyance terminus at a point far distant from the point of unloading, when the convey-

(1) *Ante*, Vol. VII., at p. 169.

(2) *Ante*, Vol. X. 150.

ing train could reasonably throw off the trucks approximately nearer the point, taking into account at the same time the ordinary methods of conducting the traffic at the particular station or place.

It by no means follows from what I have said that the company are necessarily entitled to charge for all the cost of dealing with the trucks, after "conveyance" in the charging sense has ceased. The applicants' trucks may be hauled up and down the company's sidings, in order to facilitate the company's operations in dealing with either traffic for station traders or traffic that is going on to other stations. So far as the services are not reasonably necessary for the haulage of the applicants' trucks from the "conveyance" terminus to the private siding, no charge can be made in respect of them. But for the reasonable haulage from the "conveyance" terminus to the private siding I think that the railway company are entitled to charge. Inasmuch as the Commissioners have put a different construction upon the extent of the obligation in respect of the conveyance rate, I think that the case must be remitted to them to determine the dispute in accordance with the construction adopted by this Court. Applying that construction they will determine as a question of fact where the "conveyance" ends in the circumstances of this particular case.

In my judgment we are bound to come to this conclusion by the decision of the Court of Appeal in *Sowerby's Case*.¹ But inasmuch as that decision was given before the Railway Companies Rates and Charges Orders Confirmation Acts, 1891-2, came into force, it may be as well to deal with the suggestion that in those Acts the word "conveyance" should be construed differently. I have already stated my view of the improbability of any change being contemplated. The safe and well-known rule of construction is to assume that the Legislature, when using well-known words upon which there have been

well-known decisions, uses those words in the sense which the decisions have attached to them. *Per* Lord Justice James in *Greaves v. Tofield*.¹ Further, I think that reference to the Acts themselves confirms this view. The conveyance rate is a rate for conveyance by merchandise train. It is a mileage rate. By section 10 in calculating the mileage no part of the railway may be included which may in respect of that merchandise be the subject of a charge for station terminal. In other words, in the case of traders using the railway company's own siding, the conveyance rate almost necessarily must be calculated only to the point where the trucks leave the system of running lines. The reason is that the charge for the identical service rendered to the applicants is made to the station trader in the station terminal. I attach no importance to the fact that the railway company have provided the numerous lines and sidings for their own purposes, so far as those lines and sidings form part of their carrier's station. In the present instance the railway company appear to have provided a large carrier's station for dealing in the most expeditious manner with the traffic at Cambridge Station, of which the applicants' traffic forms part. If the applicants chose to exercise their statutory right to connect their siding with an existing large station, involving a substantial journey to their siding from the point at which the vehicles have ceased to be conveyed and have reached the carrier's station, I see no reason why they should not pay for it. At the present conveyance rate, calculated as it is in the present case, it is plain that the applicants pay nothing for the service claimed. If the view taken below were correct, apparently all conveyance rates to private sidings, where they do not connect direct with main lines, would have to be measured over each yard of railroad reasonably travelled over to reach the siding points. The same rule would apply to station traders, except in so far as they were protected by section 10. This would appear to

(1) 14 Ch. D., at p. 571.

be an entirely new departure in fixing rates; it would introduce various inequalities in charges between different traders, and I do not think that it was the intention of the Legislature.

I only desire to notice a closely reasoned argument of Mr. Miller that "conveyance" must end where the station begins, and that, as "terminal station" is defined to mean "a station or place upon the railway at which a consignment of merchandise is loaded or unloaded before or after conveyance," here the station is the private siding, and therefore "conveyance" only ends at the private siding. I think that the cases cited are inconsistent with this view. The definition is not so much concerned with delimiting the word "station," as in defining what is meant by "terminal." "Station or place" must receive the ordinary general meaning. If it were otherwise, traders unloading at a railway siding would not fairly be charged with the bulk of the station terminal, which by section 3 is the charge for the use of the accommodation and duties undertaken "at the terminal station," for much of the accommodation and many of the duties would in fact not be provided at the siding itself.

It only remains to mention the contention of the company that they are entitled to charge for the use of trucks by the applicants after the conveyance has ended. This is based upon the words of section 2 of the Charges Order, which provides that the conveyance rate includes the provision of locomotive power and trucks by the company. Locomotive power, they say, only means locomotive power for conveyance by train, so the provision of trucks is only for the period during which they are conveyed by train. I think that this is fallacious. A locomotive can be changed; on the other hand, it is contemplated by Messrs. Foster that goods shall remain in the same trucks until discharged by or on behalf of the consignee. The fact that where a trader provides his own trucks, the only rebate allowed by the Act is from the conveyance rate and not from the terminal, and the express provision made for charges for the detention of trucks, only after a

reasonable period, seem to support the view that this revolutionary contention is ill-founded.

I agree with the judgment of the Master of the Rolls.

YOUNGER, L.J.: The facts of this case have been very fully stated, while a complete description of Messrs. Foster Brothers' sidings, both pink and green, and of the Great Eastern Railway Company's station at Cambridge has been given in the judgment of the Commissioners. It is permissible therefore for me to proceed without further preface to discuss the substantial question of principle which, as appears by the judgments just delivered, is raised by the appeal, dealing with it, for the sake of simplicity, in terms of inward traffic only.

The question is whether the conveyance, technically so called, of the applicants' inward traffic terminates at the siding points of their pink siding and not before, and whether the conveyance of the inward traffic of the traders using the Cambridge Station terminates when it is placed in that position in Cambridge Goods Station where traders can and do take delivery of their goods, that is at the coalfield sidings, and not before, as has been found by the Commissioners; or whether, as the railway company contend, the Commissioners ought as a matter of law to have found that the conveyance both of the applicants' and of the traders' inward traffic terminates so soon as the trucks are detached from the train standing in the running road, and are shunted thence to the station reception sidings, the appropriate siding for the inward traffic from the south being the No. 1 blue siding and that for inward traffic from the north being the back goods road siding. The Commissioners having found, as I have said, that the conveyance of the applicants' inward traffic terminates only at the siding points of their pink siding, have fixed for the applicants a rebate from the agreed station terminal, which leaves to the railway company, under the head of services rendered by them at or in connection with the

applicants' sidings, no allowance for the shunting of the applicants' traffic from the reception sidings to the siding points of their pink siding, for that distance is not, as I understand, at present included in the tonnage proportion of the rate. The appellants, the railway company, complain of this, and their complaint raises the main question of principle discussed on the appeal. The regularity of that discussion was objected to by Mr. Talbot on behalf of the applicants on the ground that the finding of the Commissioners was really one of fact, in respect of which their decision is final. It appears, however, from the Commissioners' judgment that a conclusion of law is involved in their finding of fact, and while I agree that, had they announced that finding of fact, namely, a rebate of 3d. per ton, without giving their reasons for it, the finding would not have been open to review, still their reasons, being authentically given, and when given, being found to involve a conclusion on a question of law, it follows, I think, that the order of the Commissioners is subject to appeal to this Court. See *North Eastern Railway Company v. North British Railway Company*.¹

I proceed therefore to the consideration of the main question, premising that it became common ground between the parties that, in fixing the place of termination of conveyance with reference to a tonnage rate made under the company's Rates and Charges Order, 1891, the principles of *Hall's Case*² and of *Sowerby's Case*,³ apart of course from express provision to the contrary, continue to be as applicable as they were to the interpretation of the earlier railway legislation with reference to which they were actually enunciated. Indeed, Mr. Miller's very careful analysis of the Charges Order left little room for doubt that these decisions were before the draftsman of that ordinance in preparing it. And there is one feature common to both of these decisions which it seems to me very

(1) *Ante*, Vol. X. 82.

(2) *Ante*, Vol. V. 28; 15 Q. B. D. 505.

(3) *Ante*, Vol. VII. 156.

desirable to emphasise, and that is that the conveyance rate, resulting from the dissection of the composite rate directed by each judgment, was to be the company's remuneration for doing with reference to modern conditions all and not merely some of the things which they would have done when they were conveyers only, that is when they undertook to convey and no more; and it was assumed, and I should suppose rightly assumed, that when the service of conveyance was completed, the merchandise would be at some part of the prescribed place of destination on the company's system where it could be taken over by the carrier to whom it was consigned. The contract supposed was, in other words, a self-sufficient contract to convey the goods to the carrier at their prescribed railway destination. They were not to be left in the air, or out of his reach, or brought to him in consideration of some further payment for some further service. Until the goods were at the prescribed place for the conveyer to take them to, the carrier was neither required nor entitled to interfere. Up to that point the service was that of the company as a conveyer. It was paid for by the carrier to the company as such, and in the subsequent legislation by the tonnage or mileage rate, if I may so far paraphrase the words of Lord Justice Fry in *Sowerby's Case*.¹ This essential point is brought out, I cannot help thinking, very clearly in the judgments and formal order of the Court of Appeal in *Sowerby's Case*.¹ These show, as I think pointedly, in the case of an existing composite station like Cambridge, what part of it would *prima facie* constitute the hypothetical station of the hypothetical carrier at which delivery was to be made by the railway company as conveyers under the hypothetical contract for which they were to be remunerated by the tonnage rate. It would be that part of the station which, in the words of the Master of the Rolls,² was required for dealing with the company's merchandise

(1) *Ante*, Vol. VII. 156.

(2) *Ibid.* at p. 172.

traffic as carriers, a requirement very aptly given effect to by the alteration made by the Court of Appeal in the Commissioners' Order with regard to shunting. The order in *Sowerby's Case*,¹ as altered by the Court of Appeal, required that the only shunting to be included in the carrier's or terminal charge was to be shunting attributable to the company's business of carriers "over and above," again quoting the Master of the Rolls' words in his judgment,² "what it would be if they were acting only as a railway company," that is to say, as I read these words, exclusive of all shunting necessary to bring the goods to the carrier's station, up to which point they were acting, and acting only, as a railway company or conveyers.

Now the Commissioners in the present case have stated in their judgment that the coalfield siding is, at the Cambridge station, the place for delivery of merchandise consigned to that station, and the coalfield siding is, in their view, the place where conveyance of that merchandise ends. That finding, subject to one possible qualification to be mentioned later, appears to be reached in obedience to the principle underlying the decision in *Sowerby's Case*,¹ and it is not the least formidable objection to the appellants' alternative places of destination under their hypothetical contract of conveyance, that, while no delivery is practicable at either place, No. 1 blue siding, the place of suggested destination for inward traffic from the south, is actually between the running lines of the railway and is unapproachable by any carrier or consignee whatever. In these circumstances it is difficult, except on a question of fact, to formulate the ground on which the Commissioners' finding on this point could be successfully questioned, if the question fell to be determined in accordance with the provisions of a statute in the terms of the Great Northern Railway Act, which governed *Sowerby's Case*,¹ and

(1) *Ante*, Vol. VII. 156.
(2) *Ibid.* at p. 173.

in my view, apart from the effect of section 2, which I reserve for later consideration, the present Charges Order points at least as strongly in the same direction as did the earlier Act. It appears to me that the true effect of section 3 of that Order, which provides, so far as is now material, that a station terminal is a charge which a company may make for duties undertaken by the company at the terminal station, of section 10, which provides that, in calculating the distance along the railway for the purpose of the maximum charge for conveyance of merchandise, the company shall not include any portion of their railway which may in respect of that merchandise be the subject of a charge for station terminal, and of section 26, which defines a terminal station as "a station upon the railway at which a consignment of merchandise is loaded or unloaded before or after conveyance on the railway" read together is that under the Order "conveyance" and the rate for conveyance cover everything up to the commencement of a station terminal, which in turn is a charge for a service rendered at a terminal station, that is a station where merchandise is unloaded after conveyance: in other words "conveyance" ends at the terminal station—the present equivalent of the carrier's station of *Sowerby*,¹ whatever that in the particular instance may be.

But the appellants reject that view for a special reason. They say, as I understand their contention, that inasmuch as neither the applicants' sidings, with which I will deal later, nor the coalfield sidings are so placed as that the trucks containing their merchandise can be directly deposited there by the train engine which has brought them, it results that the conveyance in each case is terminated when the trucks are deposited by that engine on the reception sidings referred to as being those most convenient. This, they say, is the effect of section 2 of the Charges Order as interpreted and, in their view, correctly interpreted, by the Commissioners, particularly in the two cases of *The Manchester, Sheffield & Lincolnshire*

(1) *Ante*, Vol. VII. 156.

Railway Company v. Pidcock & Co.,¹ and *Vickers, Sons & Maxim, Limited v. The Midland Railway Co.*² Now section 2, so far as material for this purpose, is as follows: "The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train," and in *Pidcock's Case*,¹ a case in many respects similar to the present, it was held: "That the tonnage rate authorised by section 2 of the schedule is for conveyance by merchandise train and any work incidental to such conveyance and for the performance of which it is reasonable to use the train engine, (that is to say when at a junction with the main line of either a station siding or a private siding the train has to pick up or throw off trucks the work of hauling or shunting the trucks over the points at the junction and over so much of the siding as the keeping of the main line clear of obstruction may require); but that conveyance other than this off the main line does not come within section 2," and also that the excepted conveyance might be charged to the siding owners under section 5 of the Charges Order as being a service performed at or in connection with the siding, even although it was a service which was involved in delivery and which the trader could not himself perform. Now Mr. Talbot contended very strongly that the Commissioners' finding in that case was no more than a finding of fact applicable to Retford, the station then in question, and it is true that there Messrs. Pidcock were in every instance advised of the arrival of their merchandise as it reached the company's reception siding, and that they on receipt of such advice sent to sample the grain in the wagons, and subsequently, if satisfactory, instructed the railway company to have the wagons required shunted to their own siding. It would accordingly appear that on these facts the Commissioners might well have found that what happened at the reception siding amounted to an acceptance there of delivery

(1) *Ante*, Vol. X. 150.(2) *Ante*, Vol. XI. 249.

after conveyance, in which case no question of principle would be involved in their conclusion. I cannot, however, discover that the Commissioners' judgment in any way turned upon that circumstance, and it is certainly phrased as if intended to deal with the problem before them as one of construction of the Charges Order. The judgment was delivered by Sir Frederick Peel, and the governing portion of it, I think, is contained in the passage¹ which has been already read by Lord Justice Atkin and which I need not repeat. Now, as I read that passage, the view taken of section 2 is that "conveyance" to be "conveyance" must be by merchandise train and by the train engine of that train, and that any portion of the further transit more conveniently effected, say by a station engine or even by horse power, is not an expense of conveyance. Mr. Talbot pointed out the extraordinary consequences of making conveyance in every case terminate in accordance with anything so arbitrary and accidental, something varying at every station, varying at different times at the same station, and I concur in his criticism to which I have referred.

But, further, the effect of so construing section 2 of the Charges Order is in this respect to introduce a very great modification under that Order into the Sowerby principle, at least as I understand it. For that construction of section 2 seems necessarily to involve this, that haulage by the train engine throughout is an essential part of the service to be rendered under modern conditions for the conveyance rate, even if thereby the conveyer is relieved of the previously essential requirement that for his conveyance rate he must bring the merchandise to some part of his system at the place of destination where the carrier or consignee can receive it. This modification, to my mind, goes to the very root of the matter. It seems obvious that, unless the requirement so dispensed with is observed, the service of conveyance is of no utility at all to the consignee, and that the continued maintenance of the distinction between conveyer's services and

carrier's services becomes nothing more than an interesting but quite meaningless anachronism. It is, therefore, important to see whether the Commissioners' construction of section 2 in *Pidcock* was correct. They apparently read the section as if the words "by merchandise train" were there as emphatic words contrasted with such things as the station engine or the horse power to which reference has already been made. Now in my judgment that is not the true effect of the section. It seems that the true contrast there is between conveyance "by merchandise train" and conveyance by "passenger train" referred to in Part 5 of the Schedule, it being well known that under the Charges Order the company are not bound to carry by passenger train any merchandise other than perishable goods. See *Stone v. Midland Railway Company*.¹ The passage in the judgment immediately following also contains, as I venture to think, a view of the effect of *Hall's Case*² which does not make sufficient allowance for the observations in *Sowerby's Case*,³ to which Sir Frederick Peel does not refer at all. Sir Frederick continues⁴ at the end of the passage already read by Lord Justice Atkin:—"But conveyance other than this off the main line does not seem to come within section 2; and further to hold otherwise would be giving the word 'conveyance' a meaning beyond its ordinary sense in the language of Railway Acts according to the decision in *Hall's Case*,² where it was defined by the Divisional Court on appeal from this Court as comprehending such work only as in the early days of railways was performed by a railway company acting as conveyers only and not as carriers as well and as was capable of being measured by a reference to distance travelled." I do not think the learned Commissioner could have made those observations had there been present to his mind the observations in *Sowerby*³ and the other provisions of the Charges Order to which I have already called attention.

(1) [1903] 1 K. B. 741; [1904] 1 K. B. 669.

(2) *Ante*, Vol. V. 28; 15 Q. B. D. 505.

(3) *Ante*, Vol. VII. 156.

(4) *Ante*, Vol. X. at p. 158.

in this judgment. Moreover if it be necessary or permissible, there is no difficulty in measuring the actual shunting service here in question by reference to the distance travelled, and I ought perhaps to add here, in order to avoid any misconception, that the question—whether on the footing of the Commissioners' decision in the present case, if it stands, the railway company are entitled to make any, and if so what, addition to the tonnage portion of the combined rate in respect of the distance covered by the excluded shunting or some part of it—is not touched by that decision and is no way concluded by these proceedings. I must therefore express my view that the decision of the Commissioners in *Pidcock's Case*,¹ if it is to be regarded as laying down a principle of law, is wrong and contrary both to principle and authority.

In the later case of *Vickers, Sons & Maxim v. Midland Railway Company*,² Sir Frederick Peel expressed similar views on the question of principle apparently not altogether concurred in by Lord Cobham, and not in terms alluded to by Mr. Justice Wright, whose attention was mainly directed to another aspect of the matter which does not arise here. These observations therefore, in my judgment, carry the matter no further, and the conclusion of it all, to my mind, is that there is no valid general principle enunciated in *Pidcock's Case*¹ which impeaches the correctness of the conclusion at which the Commissioners have arrived here with reference to the coalfield sidings being for conveyance the terminus of Cambridge station traffic.

Turning now to the Commissioners' decision as to the place where the conveyance of the applicants' own traffic terminates, namely, the siding points of their pink siding, my own view would be *prima facie* that in substance and effect that siding is the applicants' own carrier's or terminal station at which under the contract of conveyance, as I have already interpreted it, they are entitled to receive their mer-

(1) *Ante*, Vol. X., at p. 150.

(2) *Ante*, Vol. XI., at p. 254.

chandise. There is a marked analogy in this respect between the present case and that of *Crompton v. The Lancashire & Yorkshire Railway Company*,¹ and the conclusion arrived at by the Commissioners is, I think, in this case confirmed by the provisions of the siding agreement between the company and the respondents of November 27, 1916, and particularly by clause 5, which provides "The haulage of trucks, wagons and vans to and from the pink siding from and to the premises of the (applicants) shall during the continuance of this agreement be performed by and at the expense in all things of the (applicants), but the company shall perform all services necessary for delivering or receiving the said trucks, wagons and vans at the pink siding," the agreement in fact appearing to contemplate the termination of the conveyance at the point where *prima facie* it would on general principles be presumed to end, and that this is the normal place of the termination of the conveyance of siding traffic is shown also by the case of *The Corporation of Birmingham v. Midland Railway Company*,² to which I would add the observations of Mr. Justice Wright in *The North Staffordshire Railway Company v. Salt Union*,³ in which he clearly indicates his view that a company cannot "charge beyond the conveyance rate for anything done on their own lines which is properly incidental to delivery or collection of traffic to or from the sidings, no matter how much the cost and trouble may be increased by the inconvenience of the sidings or the nature of the traffic, unless the defects or inconvenience are such as to relieve the railway company from their duty to deliver and collect. The very existence of the siding implies in practice that the railway company must, in order to collect and deliver from or to the siding, do on their own lines something beyond the mere work of transit." Presumably, amongst other things, the learned judge had shunting in his mind.

(1) *Ante*, Vol. XI. 285.

(2) *Ante*, Vol. XIV. 24.

(3) *Ante*, Vol. X. at p. 167.

Now in the present case no defect or inconvenience in the siding is suggested, other than this, if it be such, that, like coalfield sidings they are not directly connected with the main lines of the railway. We have not here a case in which the applicants' siding from its limited size or its situation does not of itself afford sufficient accommodation for the delivery or collection of its traffic, a case referred to by Mr. Justice Wright in *North Staffordshire Railway Company v. Salt Union*;¹ nor are there in the present instance any of the special circumstances of such a kind as were found in the Birmingham case to demand special treatment. There is in this case no feature of disadvantage or inconvenience; and the fact is not alluded to by the Commissioners, beyond a certain additional burden imposed upon the railway company by the configuration of their own station, and the construction of their sidings there, inconveniences which, as Mr. Justice Wright has said, if incident to the siding itself, ought to be disregarded, and which, as I must think, should *a fortiori* be disregarded when they are incident to their own railway. I cannot think, therefore, that the Commissioners in fixing this rebate have acted upon any wrong principle. But I agree that no principle in these matters is so rigid as that it is incapable of yielding to circumstances of fact arising in the particular case, and it is the view of the Master of the Rolls that the Commissioners in the present case may not have thought so, and may not have considered the conditions at Cambridge Station from that point of view. I therefore acquiesce in his view that the case should be remitted to them, and I am content that it should go with the direction indicated by him, although I doubt myself whether their present award is not in fact justified in the circumstances of the case.

Upon the second question of principle raised on the appeal, namely, the charge for provision of trucks after conveyance, I concur in and have nothing to add to the terms

expressed by my Lord and the Lord Justice affirming the judgment of the Commissioners in that respect.

Solicitors—Parker, Garrett & Co., agents for Alex. Wilson & Cowie, Liverpool, for applicants; T. Chew, for railway company.

BRUNTONS v. NORTH BRITISH RAILWAY CO. AND NORTH EASTERN RAILWAY CO.¹

Increase of Rate—Special Contract for Limited Period—Notice of Increase—Railway and Canal Traffic Act, 1894, s. 1.

January 27. February 4. March 9, 10, 24, 1920.—The applicants carried on business at Musselburgh, and from time to time purchased goods from a company at Darlington. The said goods were conveyed over parts of the railways of the North Eastern and North British Railway Cos. and delivered to the applicants by the latter company, with whom alone the applicants had dealings. A special contract operating during the year 1907 was made between the applicants and the North British Railway Co., whereby the traffic was conveyed at a reduced rate subject to certain conditions. This was renewed from time to time at the applicants' request subject to a slight increase in 1913 (of which no complaint was made) until August, 1915, when the special rate upon an application for renewal was raised, another increase being made in May, 1916. No public notice of these increases was given by the railway companies. Upon a complaint against the said increases by the applicants, who contended that the reduced rates in force from January, 1907, to August, 1915, had become stereotyped,

Held that inasmuch as there had been from time to time a definite contract between the parties that the traffic should be carried at a certain rate for a limited period, there had been no increases of rate within the meaning of the Railway and Canal Traffic Acts, 1888 or 1894, and that there was no obligation to give notice of increase under s. 33 (6) of the former Act.

The applicants, W. N. Brunton and J. D. Brunton, trading as "Bruntons," carried on business at Musselburgh as manu-

(1) Before Lord Mackenzie, Mr. Tindal Atkinson, K.C., and Mr. W. H. Macnamara, sitting at the Parliament House, Edinburgh.

facturers of steel wire. In the course of their business they purchased steel rods from the Dinsdale Steel and Wire Company, of Darlington. The goods were forwarded by the latter company as agents for the applicants from Fighting Cocks, a goods station on the system of the North Eastern Railway Company and were delivered to the applicants at the Musselburgh station of the North British Railway Company. The latter company in April, 1907, made a special contract with the applicants which was to operate during the year 1907, and which provided that, subject to a minimum quantity being consigned, the above traffic should be conveyed at a reduced rate of 8s. 4d. per ton instead of at the ordinary permanent rate of 12s. 2d. The contract was renewed from time to time subject to a general increase of 4 per cent. in July, 1913, of which no complaint was made. The railway companies had entered into the above contract on the statement of the applicants that unless a reduced rate was given to them, they would send the traffic by the sea route. In August, 1915, the rate was raised to 9s. 1d. per ton, and in May, 1916, to 9s. 6d. per ton. It was admitted that no notice was given by public advertisement of this alteration in the rate. The applicants alleged in their application that the increases of the rate from 8s. 8d. to 9s. 1d. and from 9s. 1d. to 9s. 6d. were illegal and unreasonable, and claimed a declaration to that effect, an order requiring the North British Railway Company to desist from charging the increased rate, and an enquiry as to and payment of damages. The defendants in their joint answer alleged that the rate of 8s. 4d. was originally granted as a temporary rate, that it was renewed as such each year to the knowledge of the applicants, and that the subsequent rates of 8s. 8d., 9s. 1d. and 9s. 6d. were equally temporary rates and automatically ceased to apply when the term for which they were granted had expired, and they claimed that the increases complained of were not increases to which the Traffic Act of 1894 applied.

As the result of a preliminary hearing on questions of law arising on the pleadings on February 4, 1920, an order for proof was made reserving meantime the question of the reasonableness of the rates and the question of damages.

T. A. Gentles and D. Jamieson, for the applicants:

H. P. Macmillan, K.C., A. H. Constable, K.C., and E. O. Inglis, for the respondents.

The nature of the arguments and the evidence appear from the judgment.

LORD MACKENZIE: The applicants ask a declarator that the rates charged on certain of their traffic by the respondents are illegal and invalid. Their contention is that the rates complained of are increases within the meaning of the statutes, and therefore could not be made without the publication and notice prescribed by statute, which admittedly was not done. The answer of the railway companies is that there is here no question of increase of rates within the meaning of the statutes, as the rates complained of were deductions from the standard rates allowed under contracts which expired from time to time and had to be renewed.

The Regulation of Railways Act, 1873, section 14, provides that every railway company shall keep at each of their stations a book showing "every rate for the time being charged for the carriage of traffic . . . including any rates charged under any special contract." The Railway and Canal Traffic Act, 1888, section 33 (6) provides that where a railway company intend to make any increase in the tolls, rates or charges published in the books required to be kept by the company for public inspection under section fourteen of the Regulation of Railways Act, 1873," they shall give notice in the form prescribed by the Board of Trade.

The question is, Were the rates complained of increases of rates for the time being charged within the meaning of the

Act? If they were, then the statutory requisites ought to have been complied with. If, on the other hand, the charges complained of were not increases of rates for the time being charged, but were deductions from the existing rates, then the Railway and Canal Commission have no jurisdiction, apart from questions of undue preference, to interfere. I think, on the facts proved, that the latter is the true view, and therefore the provisions of section 33 (6) of the 1888 Act do not apply.

The history of the matter is that the applicants, who are steel wire and wire rope manufacturers in Musselburgh, on the North British Railway, are the consignees of the traffic in question. It consists of wire rods consigned by the Dinsdale Steel and Wire Company, Lim., Darlington, from Fighting Cocks, a goods station on the North Eastern Railway, in the county of Durham. The goods were put on rail at a private siding, and conveyed at owners' risk, carriage forward. The senders signed the consignment notes. The amounts due for conveyance were charged by the North British Railway Company to the applicants, and paid by them under an arrangement by which they had a ledger or monthly credit account. The goods in question fall under the Iron and Steel List in Class C., the permanent rate for which is 12s. 2d. per ton, station to station, four-ton loads, owners' risk.

Prior to 1907 a reduced temporary rate of 10s. 5d. per ton was charged. In March, 1907, Messrs. Brunton put pressure upon the North British Railway Company by threatening to have their Fighting Cocks traffic brought from Middlesbrough to Fisher-row by water, unless the North British Railway Company got for them a reduced rate. They were at that time successful. Their letter to the stationmaster, Musselburgh, dated April 3, 1907, embodies what was settled, viz.: "We are pleased to confirm the arrangement made with your Company, through you, at a rate of 8s. 4d. per ton for our rods, station to station, owner's risk, in four ton loads for

rods in coil from Fighting Cocks to Musselburgh, for an estimated quantity over twelve months of 1,800 to 2,000 tons. We shall be glad to hear if the rate can be made retrospective as from the 1st January. We understand that you will be able to do this." Messrs. Brunton had previously been asked for and given, on March 21, 1907, a guarantee that they would send the whole of their traffic by rail for twelve months. The rate being a through rate, both the North Eastern Railway Company and the North British Railway Company were jointly interested in it, and it could only be fixed after consultation between the companies. The practice on both lines, though differing in detail, is substantially the same. On the expiration of each period the matter was referred by the local agent to the chief goods department, and authority obtained for the quotation of the rate. A sample of the authority in use to be granted is contained in the communication, dated April 15, 1907, sent from the Chief Goods Manager's Office, Glasgow, to Mr. Pratt, stationmaster, Musselburgh. It is headed :

"Advice of Exceptional Rate for a Special lot of Traffic.

"Description Wire rods, iron.

"Quantity 1800/2000 tons.

"From Fighting Cocks.

"To your station.

"Special Rate and Conditions ... 8s. 4d. per ton, s. to s.
Four tons loads. O.R.

"To operate from 1st January, 1907, to 31st December, 1907."

The stationmaster at Musselburgh, on receiving this advice, pinned it into his rate book. The similar advice received by the agent at Fighting Cocks from his superiors was gummed into his rate book. In each case the slip so inserted was retained in the book only until the expiry of the period. It is evident that in 1908, at the inception of the reduced rate, Messrs. Brunton recognised the temporary character of the arrangement. This is shown by their letter to the North

British Railway Company, dated January 13, 1908, viz.: "Referring to your call here the other day, we understand that the special rate which you obtained for us last year for wire rods (in coil) from Fighting Cocks to Musselburgh has now expired. We shall be pleased to hear if you could have this special rate renewed, and, if so, we are in hopes of sending as much traffic over the route as we did during the last year, which is about 2,000 tons."

The position on January 13, 1908, was that the applicants were applying for the renewal of a special rate. There was no rate for the time being, as the agreed-on rate had expired on December 31, 1907. As a matter of fact, the North British Railway Company did agree to renew the rate until December 31, 1908, that is to say, they made a fresh agreement on the same terms. Suppose, however, that at that time the North British Railway Company and the North Eastern Railway Company had refused to carry the applicants' traffic on any terms other than the permanent rate which they had statutory authority to charge, there would have been no jurisdiction in the Railway and Canal Commission to order them to enter into a fresh contract on the same terms as the old. It is impossible to contend that the applicants would have been entitled to complain in 1908 to the Railway and Canal Commission, if there had then been a refusal to renew the special rate. The 8s. 4d. rate was continued until July, 1913, when it was increased by the general increase of 4 per cent. to 8s. 8d. About this there is no complaint.

The complaint in these proceedings is in regard to an increase to 9s. 1d. on August 18, 1915, and to 9s. 6d. on May 19, 1916. The argument in regard to the increase to 9s. 1d. is that by 1915 the special rate of 8s. 4d., whatever may have been its legal character at its inception, had in reality become a permanent rate, renewed as matter of routine. As it was put by the applicants, so long as the railway companies were satisfied there was live traffic each company was willing to

continue the rate. The North Eastern Railway Company did not apparently insist on application for renewal. The relations of the applicants and the North British Railway Company are evidenced by the applicants' letter of January 15, 1912, viz.: "Re Special Rate Fighting Cocks and Musselburgh. We hereby make application for renewal of above during this year. The probable quantity which will be delivered is not certain, nor can we even give you an estimate as to the tonnage. We think, however, that there will be more traffic passing this way in the coming year than in the last year. Please oblige us by renewal of this rate, decreased if possible, and oblige."

The letter from the stationmaster at Musselburgh to the applicants of January 17, 1912, was in these terms: "Wire rods in coil in class C. Fighting Cocks and Musselburgh. I have yours of 15th inst. regarding above. It is absolutely necessary in order to get a renewal of the exceptional rate in operation last year for this traffic, for you to supply me with at least the approximate tonnage likely to pass for year 1912. I observe you brought forward over 1,300 tons in 1911, and this will probably assist you in arriving at a fair estimate for this year."

The applicants replied on January 18, 1912, viz.:—"Yours of the 17th inst. to hand. We can estimate this traffic at 1,200 to 1,500 tons and cannot give you anything more definite. Hoping this will suffice."

Reference may also be made to the Musselburgh stationmaster's letter of July 29, 1912, "Wire rods in coil from Middlesbrough and Fighting Cocks and Musselburgh. With reference to your letter asking for renewal of the exceptional rates for traffic as above. The Chief Goods Manager has renewed the rates previously in operation and with all the same conditions as formerly operated, till 31st December, 1912." On January 30, 1913, he wrote: "Wire rods in coil Middlesbrough to Musselburgh and Fighting Cocks to Musselburgh. I beg to inform you of the renewal of the rate for

wire rods in coil Middlesbrough to Musselburgh and Fighting Cocks to Musselburgh at a rate of 8s. 4d. per ton for quantities approximately 700/1000 tons and 1,500/2000 tons in four ton loads and at owner's risk to operate till 31st December, 1913. The rates referred to, however, are subject to any general increase that may be decided upon during the interval, and you will please *specially note this condition.*"

The applicants wrote to the stationmaster, Musselburgh, on April 16, 1914: "With reference to the special rates that we have from your company to various points, Mr. Sinclair informs me that you spoke to him the other day about our not applying to you for renewal of these. Some years ago, I wrote and asked either you or your predecessor to make application for us for renewal of all our special rates when the time comes round, and I should feel obliged if you would kindly do this in future." Mr. Sinclair referred to was the applicants' works manager. This letter is a recognition of the necessity, as regards the North British Railway Company's system, of making application, and it contains a warrant to the stationmaster at Musselburgh to do what was necessary on behalf of the applicants in regard to the matter. Mr. Brunton characterised this as red tape, mere matter of formality, or, as put in one of the letters: "The point of renewal had come to be regarded as a pedantic conforming to some domestic rule of your departments."

It is not possible, in my opinion, to go through the documents which have been produced in this case and take this view. The rate appears to have been scrutinised by the officials of both companies from time to time, as they were in duty bound to do. It would have been obvious to a man of business, that, as Mr. Brunton had put pressure on the railway company by representing he could send the traffic by water, if there was no longer any possibility of getting shipping to carry the traffic, the railway company might refuse to make a new contract on the old terms. This is what the North British Railway Company did on August 18, 1915,

when the rate was raised to 9s. 1d. In my judgment there was a definite contract between the parties that the traffic should be carried at certain rates for a limited period, and that being so, there has been no increase of rate within the meaning of the Acts, 1888 or 1894.

I am unable to take the view that Messrs. Brunton had secured from the railway companies a rate stereotyped so long as the traffic continued to pass. The rate was in every case quoted as applicable to traffic to pass within a specified period. There is a conflict of evidence as to the communications which passed between the stationmaster at Musselburgh and Messrs. Brunton. There is an absence of documentary proof of letters passing between the year 1914 and 1918. The staffs of both applicants and respondents were disorganised. The station at Musselburgh is adjacent to the applicants' works. From August 17, 1915, the railway company charged 9s. 1d., and from May 26, 1916, they charged 9s. 6d. These charges are shown in the advice notes in No. 19 from Glasgow to Edinburgh. Mr. Pratt, the stationmaster at Musselburgh, says that he intimated these changes by letter which he delivered himself to Messrs. Brunton. The applicants' chief clerk, Hayburn, says the change in rate was not brought to his notice. In this I think he must be held to be mistaken, in view of the evidence of Murrie, which was distinct on the point that he discussed the 9s. 1d. rate with Hayburn. The matter, however, does not rest on verbal testimony, for the slips produced show that the accounts were checked in the applicants' office. Objection was noted on the slip No. 45, under date August, 1915, thus: "Less 5d. per ton on 32 tons, 8 cwt. 1 qr. from Fighting Cocks. Overcharge 13s. 6d." No. 28 is the invoice, dated October, 1915, which came back to Messrs. Brunton, with the charge of 13s. 6d. restored and the note "Deducted by you. Rate in order." Mr. Pratt says this was done on his instructions. There is the same objection on No. 46, dated September, 1915, and on No. 29 the invoice from the station at Musselburgh to Messrs. Brunton

came back with the marking: "Rate quite in order. The rate from Fighting Cocks is quite correct." The three slips, No. 43, show that in October and November, 1916, and April, 1917, the amount of the rate was fully in view of the person checking the account for Messrs. Brunton. In each case the slip bears: "Rate charged 9s. 6d. Rate should be 9s. 1d." The overcharge in each case was stated to be due to "Error in extension." On January 10, 1918, the stationmaster at Musselburgh wrote to Messrs. Brunton: "Wire rods, iron or steel for lot Fighting Cocks and Musselburgh. I beg to inform you that the rate for above has been renewed as from now to June 30, 1918, as undernoted:—9s. 6d. per ton, private siding to station, four ton loads at owner's risk." On June 22, 1918, and November 29, 1918, the stationmaster wrote that the rate was renewed to December 31, 1918. It was not until December 2, 1918, that Messrs. Brunton took exception to the rate charged. In the course of correspondence Messrs. Brunton wrote to the Chief Goods Manager, North British Railway Company, on December 18, 1918: "We cannot understand how these charges have been passed by our staff." It is the case that the charges were passed by those in the employment of Messrs. Brunton. Although Mr. Brunton may not have had his attention directed to the changes in rates, those in whose hands he left the matter were made aware of the alterations when they were made. One passage in the letters written by Messrs. Brunton shows that they were in error as to their position. On February 14, 1919, they wrote to the North British Railway Company: "We dissent very strongly from the statement contained in your letter that this rate was put in force for a special lot for a limited period." This is not consistent with the correspondence already referred to. As regards the way in which the applicants' rate was dealt with by the railway company, it appears from the correspondence that a great many similar temporary rates all over the country—originally quoted, as in this case, against water conveyance—were dealt with in the same way from the

outbreak of war onwards, and if renewal was required they were renewed with increases from time to time until the temporary rates closely approached the permanent rates, when they were allowed to drop and the permanent figures left to apply. The North British Railway Company did not, however, go so far in the case of the applicants.

The case has been considered as presented by the applicants, on the footing that the only parties concerned are the applicants and the North British Railway Company; and that the North Eastern Railway Company do not come into it, as the consignors had no concern with the rate fixed. It is unnecessary, in the view I take of the case, to go into the question of the legal position of the North Eastern Railway Company and the relation of that company to the North British Railway Company. There was no obligation on the railway companies, or either or them, before fresh contracts were made to give the notices required under section 33 (6) of the 1888 Act.

There will, therefore, be a finding that the rates of 9s. 1d. and 9s. 6d. respectively charged upon the traffic of the applicants are not illegal and invalid. This is sufficient to dispose of the whole case, for we have no jurisdiction to go into the other matters dealt with, if the finding asked under head (a) is refused.

MR. TINDAL ATKINSON and MR. MACNAMARA concurred.

Solicitors—M. J. Brown, Son & Co., S.C.C., Edinburgh, for applicants; James Hatsen, S.C.C., Edinburgh, for North British Railway Co.; Sir R. F. Dunnell, K.C.B., York, for North Eastern Railway Co.

WILMAN & SONS v. GREAT NORTHERN
RAILWAY CO.¹

Classification—Silk Noil Yarn—Railway Rates and Charges Orders, 1891-2.

December 17, 18, 1919. January 13, 1920.—Silk noil yarn having no constituent other than silk in its composition is “silk,” and therefore within Class 5 of the statutory classification of merchandise, although it would not be colloquially spoken of as silk. The word “silk” in the above classification is used in its widest and most comprehensive sense to denote the substance or material which comes from the raw silk, whatever be its quality.

The applicants were silk noil spinners and manufacturers at Pudsey, Yorkshire, and consigned large quantities of silk noil yarn by the defendants’ railway under the description of “yarn.” The defendants, up to the month of January, 1917, had been under the belief that the goods in question were yarns as defined in class 3 of the statutory classification of merchandise, namely, “yarns, twist and weft (except silk)” and had charged for them accordingly. They then ascertained that the yarn so consigned was composed of silk, which they claimed came within class 5 of the above classification, class 4 rates in fact being charged after the above date.

The applicants by their application stated that silk noil yarn was manufactured from silk noils, these being the refuse resulting from the spinning of that part of silk waste which is of so low a quality that it cannot be spun as silk waste, and they claimed that the yarn was not “silk” within class 5 of the classification and ought to be included in class 3 as being an unclassified article. They also relied upon an alleged arrangement made in 1907 between one of their partners and the stationmaster at the defendants’ Pudsey Station, whereby the rates in question were to be based on certain other rates from Bradford previously paid by them. They applied for an

(1) Before Lush, J., and Mr. Tindal Atkinson, K.C., sitting at the Royal Courts of Justice, London.

order that the yarn was in Class 3 or alternatively that the increase of rate was unreasonable.

The defendants' case was that the yarn in question, being composed of silk, ought to be regarded as "silk" within class 5 of the classification, and that any arrangement as to rates had been made on the basis that the goods were yarn as defined in class 3.

Evidence was given at the hearing to the effect that this kind of yarn was dull in appearance, that it did not either as yarn or in its manufactured state resemble silk as ordinarily understood, and was not commercially known as silk.

W. J. Disturnal, K.C., and W. J. Jeeves, for the applicants.

G. J. Talbot, K.C., and Bruce Thomas, for the defendants.

LUSH, J.: The question which we have to decide in this case is whether the applicants are entitled to have the silk noil yarn which they consign by the defendants' railway carried at the class 3 rate. They raise two contentions. They say that the defendants in 1907 admitted that that was the rate which was applicable to this kind of yarn, and after making that admission they carried it at that rate for many years until 1917, and that they were not entitled, as they then asserted a right to do, to go back upon that admission and charge the class 4 rate for the yarn. They further say that the class 3 rate is the proper rate, because this particular kind of yarn is unclassified. If that is so, that would, of course, be the proper rate. The defendants deny that they ever made any such admission, and they say that the yarn is not unclassified, but is "silk," which is in class 5, although they have been and are willing to carry it at the class 4 rate.

The facts are as follows: The applicants are silk noil spinners and manufacturers, carrying on business at Pudsey, in Yorkshire. They manufacture the yarn from silk noils, and consign a large quantity of such yarn every year by the

defendants' railway. Silk noils are a product and result of certain processes to which the raw silk as it comes from the cocoon is subjected. They consist of the short and irregular filaments of silk, which are separated from the long filaments by a process of combing. Raw silk is first converted into silk waste, and that is then combed. It is in this process that the separation of the long and short filaments takes place. It is wrong to regard the short filaments as refuse, as we were asked to regard them. They are as essentially silk in their nature and substance as the longer filaments. They lose none of the silk substance in the process of combing. But there is a great difference between them in appearance and value. The longer filaments, partly owing to their greater length and partly to their cylindrical form, are of a highly lustrous appearance, and after dressing are ultimately spun into silk, as that material is ordinarily understood. The shorter filaments, on the other hand, have practically no lustre or gloss. These short threads do not lie in line together as the long filaments do, and are not so cylindrical in form, and consequently they are dull and comparatively opaque. They do not really resemble the silk that one is familiar with, although they are exclusively silk so far as their substance is concerned. The goods into which they are made up are much cheaper than the ordinary lustrous silk. Having been separated in this way, these short threads go through a process which makes them into silk noils, and it is from these that the silk noil yarn is made. This yarn is also dull and opaque in appearance, and it is a good deal coarser than the long filaments. It is ultimately woven into what is to all appearances a kind of cloth. This is used, and was very largely used during the war, for carrying shot and ammunition. It is so used because silk is very tough and more proof against fire than other material.

Now I will deal first with the applicants' contention that this silk noil yarn was admitted by the defendants to be subject to the class 3 rate. Their case is this. They say that, in

1907, the station master at Pudsey was asked by a member of their firm what the proper rate for this yarn was, and that after considering the matter he stated that it was class 3, and that the company carried it at that rate. They further say that the company accordingly had large quantities of it delivered to them for carriage, which they carried at that rate without raising any question for ten years, and that, therefore, they were not entitled afterwards to say that the yarn was something different to what they had admitted it was and to alter the rate, as they claimed to do, in 1917. The applicants do not, on these alleged facts, contend that there has been a wrongful increase of rate, nor do they set up a contract. They rely on an admission and say that it is binding on the defendants. In my opinion, there is no ground for this contention either in fact or in law. The stationmaster made no admission in fact. All that happened in 1907 was this. The applicants had just changed their place of business and moved to Pudsey. They wished to know what the rate would be for their yarn by the Great Northern Company, they having previously sent it by the Lancashire and Yorkshire Company. All that the stationmaster did was to consult the rate book and give them the information. The yarn was always consigned as "Yarn" merely, and the stationmaster had no knowledge of its composition or substance. If the applicants ever told him that they dealt in silk noils, as they say, the stationmaster attached no importance to it, and was not asked to. He denies that they were ever mentioned. He was not asked to make an admission and he never made any, and if he had done so, he would have made it in ignorance of the true facts, and he had no authority to make it. The defendants did not know what this silk noil yarn was composed of until 1917 or shortly before that year, and they then asserted that it was silk within the meaning of the statutory classification. If they were right in making this assertion, they have done nothing to disentitle them to rely upon it.

The contention of the applicants upon this second point is,

that whatever may be the substance of this yarn, it is not commercially or colloquially, it was said, known or spoken of as "silk," and that that is the proper and only test to apply in determining whether it is included in "Silk" in the classification. It has, no doubt, often been held in this Court that, in determining whether a particular article of commerce corresponds with a particular description of goods in the classification, the true test is how are the goods commercially described. It is also true that this yarn would not be colloquially spoken of as silk. Whether it is true to say that it is commercially silk, depends on what a trader would mean when he speaks of silk. The word may denote, and would naturally denote, the substance of which the article is made. There are many varieties of things which are all equally silk, and many varieties of silk itself; raw silk, dressed silk, spun silk, etc. Silk by itself is not a particular article of commerce like files, scrap iron, or spirits of tar to which the test referred to has recently been applied. When one examines the classification in light of the circumstances under which it was compiled, I think it is clear that the word "silk" was used in its widest and most comprehensive sense, to denote the substance or material which comes from the raw silk whatever be its quality, and that it was not used in the narrow sense contended for. The position when the Commission was examining into the rates which the railway companies were charging for the carriage of goods, and was compiling the statutory classification was this. They had before them the railway classifications. The defendants in their classification had various subdivisions of silk; raw silk, dressed silk and silk noils. The latter, silk noils, and the yarn made from it were perfectly well-known commodities. The yarn made from it had been examined by a body at Bradford, which was authorised by a private Act of Parliament on request to examine into the composition and substance of different fabrics, and had been certified to be practically pure silk. It was known by experts to be silk. The Commission, as the result of their

investigations, dealt in this way with these various kinds of silk. They omitted all the subdivisions which had formerly appeared, and only inserted one description in the classification, namely, "Silk" which they placed in class 5, and the classification was adopted by the Legislature in that form. "Silk noils" are omitted, and "silk noil yarn" is not mentioned, except by way of exclusion from other kinds of yarn, for when one turns to "Yarn," one finds this: "Yarn twist and weft except silk," class 3. Wool, with its various subdivisions, is very differently treated. There one finds "Dressed or carded wool" specifically mentioned, and "Woollen goods" are classified, being placed in classes 3 and 4, according as they are in bales, packs or trusses, or not. The contrast is significant.

It is impossible to suppose that the Commission and the Legislature in adopting their classification would have dealt with the matter in this way, unless they had intended to include all kinds of silk, namely, that which comes from the long filaments and that also which comes from the short filaments, and it is equally impossible to suppose, with all these materials before them, that the Commission forgot to deal with the latter altogether, and omitted them from the classification. When one turns to class 4 the matter becomes still more clear. One finds there such things as these enumerated: "Braces for wearing apparel, not silk," "Caps, men's and boys (except silk), in boxes or cases," "Clothing, exclusive of silk goods." Woollen and worsted goods, on the other hand, are placed, speaking generally, in class 4, as are "Textile fabrics made of mixed cotton, linen, wool or similar materials." The inference is irresistible that the Legislature intended to place all goods of silk substance together in class 5, leaving it to the railway companies to discriminate between them as they thought fit. It is no answer to say, as was said, that the coarser short filament silk is of much lower value than the other. Many articles or goods of different value are grouped together in the classification, and although, no

doubt, it would be a proper element to consider if a question of classification was in doubt, one cannot allow such a circumstance to prevail against a plain inference to be drawn from the classification itself.

For these reasons I am of opinion that the defendants are entitled to charge the class 4 rate for this silk noil yarn, and that the application fails.

MR. TINDAL ATKINSON: I agree. The real question in this case is what comes under the description of "Silk" in class 5 of the statutory classification. It is not disputed that the material composing the yarn is silk in the sense that there is no constituent other than silk in its composition. It is the residuum of a residuum of silk created in the course of manufacture, and differs from all other silks only in this:—that it is perhaps the lowest quality of silk capable of being converted into an article of commerce. "Silk," therefore, is its proper description, and in truth this yarn cannot be correctly described or commercially dealt with except by the introduction of the word "silk." It matters not whether the material is called "Silk yarn" or "Yarn made from silk noils." It is still silk. If it is merely a question of quality the applicants are driven to argue that the description "Silk" in the Order refers only to high-class silks and not to an inferior quality of the same material. No line has been suggested to show where one ends and the other begins for the purposes of the definition in question, and one is driven to the conclusion that in using the description "Silk" the Legislature intended to cover all qualities of silk from the finest satins to the coarsest cloth, so long as the sole constituent was silk. This view, I think, is strongly corroborated by the point urged by the railway company that Parliament has deliberately dropped the several denominations of "Silk waste undressed," "Silk waste dressed or spun," and "Silk noils" which existed in the company's working classifications before 1888, and left the single description "Silk" to cover the whole range of silk goods. I think

it was intended to leave to the railway company afterwards to differentiate, if it thought fit, between the different classes and qualities of silk goods according to the value, subject always to the statutory maximum.

Any case founded on the interview with the stationmaster in my opinion entirely fails. The evidence of the stationmaster, which I accept, is to the effect that the only question asked on that occasion was as to the rate for yarn. He says that he referred to the rate book and quoted the rate he found there for yarn. He was not informed, nor did he know that the yarn to be conveyed was made from silk. I agree, therefore, that the application fails.

Solicitors—Blundell, Baker & Co., agents for Gordon, Hunter & Duncan, Bradford, for the applicants; R. Hill Dawe, for the defendants.

MIDLAND RAILWAY CO., GREAT WESTERN RAILWAY CO., AND LANCASHIRE AND YORKSHIRE RAILWAY CO. v. BROTHERTON & CO., LIM. AND WM. BUTLER & CO. (BRISTOL), LIM.¹

Classification of Goods—Dangerous Goods—Discretion of Railway Company—Railway Clauses Consolidation Act, 1845, s. 105—Rates and Charges Orders Confirmation Acts, 1891-2—Schedule, Part IV.

May 10, 11, 12, 13, 20, 1920.—A difference having arisen between the parties as to whether heavy naphtha, which is a mineral tar oil, was specifically included and described in Class 1 of the classification annexed to the Rates and Charges Orders Confirmation Acts, 1891-2, as mineral tar oil—not dangerous, or whether it was “dangerous goods” within Part IV. of the Schedule to the above Acts:

Held, that the expression “mineral tar oil” is a generic term and does not specifically describe heavy naphtha, and that if any

(1) Before Lush, J., Mr. Tindal Atkinson, K.C., and Mr. W. H. Macnamara, sitting at the Royal Courts of Justice, London.

specific mineral tar oil is dangerous it does not fall within the catalogue of oils set out under Class 1 of the above classification.

Held, further, that the use of the expressions "dangerous goods" and "oils not dangerous" in the above Rates and Charges Order had not removed from the railway companies their right to decide under section 105 of the Railways Clauses Act, 1845, as to what goods are dangerous, or left the question to be decided as one of fact, and that the railway companies in the present case having *bona fide* and reasonably held that heavy naphtha was dangerous, were entitled to treat it as such within Part IV. of the Schedules to their Rates and Charges Orders.

The Court will not decide whether a given article is dangerous as a question of fact—NORTH EASTERN RAILWAY CO. v. RECKITT, *ante*, vol. xv. 137, considered.

THIS was an application by the Midland, Great Western, and Lancashire and Yorkshire Railway Companies, for a declaration that certain traffic consigned over their railways by the defendants and known commercially as heavy naphtha was "dangerous goods" within the meaning of Part IV. of the schedules to their respective Rates and Charges Orders Confirmation Acts, 1891—2.

Heavy naphtha is a mineral tar oil.

Class 1 of the classification annexed to the above Rates and Charges Orders contains the following entry: "Oils, not dangerous, in casks or iron drums, round or tapered at one end, as follows:—" There is then set out a list of oils including "Tar, mineral."

The railway companies contended that the above classification only referred to non-dangerous mineral tar oils, that heavy naphtha was in fact dangerous and therefore excluded from the classification, and, further, that they were entitled in the exercise of the discretion given them by section 105 of the Railways Clauses Act, 1845, to treat it as dangerous and to charge a reasonable sum (which was higher than the Class 1 rate) for it as such under Part IV. of the schedules to their above Charging Orders.

The defendants contended that heavy naphtha was specifically referred to in the above classification under the heading of "Tar, mineral" oil, and therein declared to be non-

dangerous, and that the above discretionary power of the railway companies to treat it as dangerous was therefore removed. They also denied that the oil in question was in fact dangerous.

Sir John Simon, K.C., Eustace Hills, K.C., and Bruce Thomas appeared for the applicants:

R. Whitehead, K.C., Holman Gregory, K.C., and E. Clements, for the defendants:

LUSH, J.: The dispute between the railway companies and the two firms in this case relates to the conveyance of a certain product of coal tar which is commercially known and dealt with as heavy naphtha, but which has for very many years been consigned by the two firms, and as they say is properly consigned, under the description of "mineral tar oil." The applicants, the railway companies, say that this product, the real character of which they have now ascertained to be heavy naphtha, comes under the description of "dangerous goods" in Part IV. of the Rates and Charges Orders Confirmation Acts, and that they are accordingly entitled to charge a reasonable rate for its conveyance. They have placed it in a class a good deal higher than that in which it could properly be placed if it is specifically described as "mineral tar oil" in that part of the classification which deals with the carriage of oils, and if it is not properly placed in the class of dangerous goods. The defendants, the two firms, have denied that the products in question are dangerous goods at all, or that the railway companies are entitled so to treat them, and they refused to pay the rate charged. Their contention is that the goods are specifically described in the statutory classification as "mineral tar oil," which is expressly treated as non-dangerous and is classified. Each of the railway companies have, since the dispute arose, had some consignments of the product analysed. There are about twenty samples altogether. The results are in evidence before

us. The companies claim a declaration to the effect in substance that these are dangerous goods, which is resisted by the defendants.

Now the statutory classification in dealing with the charges for the conveyance of oils says this: "Oils not dangerous in casks or iron drums round or tapered at one end as follows"; and then comes a schedule of oils among which are the words "tar, mineral." The first question that we have to decide is whether these words "mineral tar oil" do specifically describe these products. If they do, the question would arise whether the railway companies are entitled to say that they have ascertained that they are in fact dangerous, and to deal with them as such, although they are otherwise classified. If they do not, the only question to be considered will be whether they are dangerous within the meaning of the statutory classification and Part IV. of the Rates and Charges Orders Confirmation Acts.

Now we have had a great deal of evidence not only as to the process by which the various spirits or oils are obtained by distillation from coal tar, but as to the products themselves and their different characteristics, and the descriptions or names given to them by those who deal commercially in them. It is clear on the evidence of the defendants' witnesses themselves that the expression "mineral tar oil" is not the commercial description of one specific product or oil, but is a generic term which embraces a great many different specific products. One witness called for the defendants admitted that benzol, a highly inflammable and dangerous product, is a mineral tar oil, and so is creosote an admittedly non-dangerous oil. And it was also admitted that if a customer asked to be supplied with mineral tar oil, the supplier would not know without some further description what goods he wanted. The oil known commercially as "heavy naphtha" is no doubt a mineral tar oil. But it was known specifically under its commercial description of "heavy naphtha" long before and at the time when the statutory classification was

compiled. It was mentioned in the Railway Clearing House classification in force at that time, and was treated as a dangerous article. The goods were, in fact, ordered from and invoiced by the defendants themselves under the description of naphtha or heavy naphtha in the case of most of the twenty samples. "Naphtha" is omitted from the schedule of non-dangerous oils in that part of the statutory classification which deals with the carriage of oils. Under those circumstances it is impossible to say that where the Legislature used the generic term "mineral tar oils," they were referring to this specific product.

I think it is clear that the meaning of the words which I have referred to in the statutory classification relating to oils, is that any mineral tar oil that is not dangerous is to be placed in the class there mentioned, and charged for accordingly. The words apply to many oils not specifically mentioned in the non-dangerous class, creosote oil for example, anthracene oil, fuel oil, etc. If any specific product is a dangerous oil, it does not fall within the catalogue of oils set out in this part of the classification, and is left to be dealt with by the railway companies as dangerous goods, and charged for as such. The question, therefore, whether a railway company can treat an article which is classified as a non-dangerous article as dangerous, if it turns out to be so from subsequent experience or from its being mixed with some ingredient which makes the compound dangerous, does not arise. The point was to some extent discussed during the argument, but it is not necessary to consider the authorities and express any opinion with regard to it.

The next question to consider is whether these products are "dangerous goods" within the meaning of Part IV. of the Rates and Charges Orders Confirmation Acts and "dangerous" oils within the meaning of that part of the statutory classification relating to the conveyance of oils. Now what does the word "dangerous" in these two documents mean? Does it mean dangerous in fact, in which case this Court, or whatever

may be the tribunal which has to deal with the question, would have to decide it as a question of fact, or does it mean goods which, for the purpose of fixing the rate, must be treated as dangerous goods? The applicants, the railway companies, while not shrinking from the issue whether they are dangerous in fact—indeed they have, as the defendants have, pressed us to decide the question as one of fact—contend that it is for the railway company to decide what goods are dangerous, and they say that, inasmuch as they have *bona fide* come to the conclusion that these samples are dangerous goods, they come properly and necessarily within that class for the purpose of fixing the rate for their conveyance. I think that this contention is right.

The Legislature, from the earliest times in the history of railway legislation, quite clearly left it to the railway companies to decide what goods are dangerous, and enabled them to refuse to carry any goods which, in their judgment, were dangerous. Section 105 of the Railways Clauses Consolidation Act, 1845, is as follows: “No person shall be entitled to carry, or to require the company to carry, upon the railway” any specific goods which are mentioned, “or any other goods which, in the judgment of the company may be of a dangerous nature; and if any person send by the railway any such goods without distinctly marking their nature on the outside of the package containing the same, or otherwise giving notice in writing to the bookkeeper or other servant of the company with whom the same are left, at the time of so sending, he shall forfeit to the company £20 for every such offence; and it shall be lawful for the company to refuse to take any parcel that they may suspect to contain goods of a dangerous nature, or require the same to be opened to ascertain the facts.” If a trader, therefore, were to consign goods for carriage by a railway company which, to his knowledge, were treated by that company as dangerous goods, concealing their true character, he would be liable to a penalty. If he declared their true character, or if it was known to the company, the com-

pany could decline to carry them. It would not be for the Court to determine whether, in fact, they were dangerous. It is obvious why the question as to the dangerous or non-dangerous character of goods tendered for conveyance was left to the company. The term "dangerous" is a relative term. It is not defined and it is difficult to define it. If Parliament had said that a railway company could only refuse to carry goods if they were dangerous in fact, a jury might have had to decide whether they were or not, and to decide it without reference to any particular standard, and without appreciating or being able to know what the degree of risk was to which the railway company's property and the goods of other traders would be exposed, if the goods were consigned without any warning to the company as to their true character. It would not be possible for them to properly appreciate what the precise conditions of carriage are with reference to which the question of danger would have to be determined. Moreover, there would be no uniformity in the classification, if the question was dealt with in that way.

Now, has the Legislature, in using the term "dangerous" in the statutory classification and in the Rates and Charges Orders Confirmation Acts, removed this discretion from the railway companies and left the question to be decided in each case as a question of fact? I cannot feel any doubt as to the proper answer to this question. It is, I think, clear that no such change in the law was intended. If it were, section 105 of the Railways Clauses Consolidation Act, 1845, would wholly or partially be repealed. A statute can only be repealed by implication if such repeal is necessarily and clearly intended, and I think that it was clearly not so intended. The Legislature, in speaking of "dangerous goods" and "oils, not dangerous," was dealing with goods for the purpose of enacting what rate should be charged for their conveyance, and no alteration in the mode of deciding which goods come within that class was intended. That question would still be decided by the same authority that decided it before, namely,

the railway company. The reasonableness of the sum charged can be questioned in case of dispute, but not the character or quality of the goods. This view is, I think, in accordance with the view of this Court as expressed in the judgments in *North Eastern Railway Company v. Reckitt & Sons, Ltd.* The company must of course exercise a *bona fide* judgment, which I think means upon some reasonable evidence or reasonable grounds on which to exercise it, but if they have acted *bona fide* in that sense, it is not in my view competent to this or any Court to override their decision. It is said here for the defendants that the applicants have not acted *bona fide* or reasonably in coming to the conclusion that this heavy naphtha is dangerous. If they make out this case they would be entitled to succeed, but if they fail no question can, as I have said, in my opinion arise as to the dangerous character in fact of these samples. We were, as I say, pressed by both sides to decide the question of fact in any case, and we were at one time disposed, if we properly could, to do so. We were told that it would give satisfaction to the traders to have the question decided by this Court. And our attention was called to the fact that in the case of the *North Eastern Railway Company v. Reckitt*¹ this Court did decide the question. But, as we pointed out before the arguments were concluded, it might lead to very undesirable results if the Court in a case like this were to determine such a question. If we embark on the question at all we must express our opinion, whether it be in favour of or against the railway companies. If we agreed with the companies, it might be a satisfaction to those concerned to know that the companies' conclusion was in our opinion well founded; but if we disagreed, the result would be that the companies would either have to do what they and their expert advisers considered was a danger to the public, or assert their right as to carrying goods which the Court had held not to be dangerous at all. I therefore am of opinion that

we ought not to follow the precedent which was cited to us, and that we ought to say that if the applicants have acted *bona fide* and reasonably in treating these samples as dangerous, they are dangerous for the purposes of the statutory classification. It will, of course, not be supposed that I am suggesting any view adverse to that taken by the applicants and their advisers. I only decline to enter upon a determination of this question, because I think that it is not a question with which we have authority to deal.

The last question to consider is, whether the railway companies have acted *bona fide* and on reasonable grounds in holding these samples to be dangerous. There is, I think, no doubt that they have, and there is no ground whatever for contending the contrary. The way in which heavy naphtha had been dealt with in the railway classification prior to 1892, and the evidence of the experienced witnesses who have been called before us, some of them independent witnesses, make it perfectly clear. This product has for very many years been scheduled as "dangerous," and special provisions have been made for its consignment and storage. It is not so dangerous as solvent naphtha and is put into a different class from solvent naphtha, but they have both been treated as dangerous for a long period of years. The witnesses called for the defendants admit that it is more dangerous than creosote. Those called for the applicants say that it would be quite unsafe to carry and treat it as an ordinary commercial article. If securely packed so that no leakage could possibly take place, the risk might, no doubt, be treated as very small. But the question is, what the true character of the oil itself is, not what the danger is if it cannot escape from the receptacle that holds it. The case for the defendants really is that if the flash point of an oil like this is over 100 degrees Fahrenheit, which is true of this product, there is no danger in carrying it. The railway companies and their advisers and witnesses place the limit of a safe flashpoint at 150 degrees Fahrenheit. Most of these twenty samples have a flashpoint

only slightly over 100 degrees Fahrenheit, and the highest is 130 degrees. Other authorities seem from the documents in evidence before us to take the same view as to 150 degrees being the proper line of demarcation. The railway companies are quite entitled to take the view which they have taken, that that is the correct limit. That they have not acted in bad faith in taking it is obviously true. No doubt the Lancashire and Yorkshire Railway Company for some years prior to 1913 were content to act on the traders' view as to 100 degrees being a safe limit, but because they were content to take the risk then, it cannot possibly be said that they have not acted *bona fide* in coming to the same view as that taken by the other companies in 1913.

The defendants strongly rely on there having been no accident in the carriage of these goods when not properly declared, but that is only one element to be considered. The companies may have been fortunate in not having had an accident. The fact that none has occurred does not prove that there was never any risk. The chief element, or one of the chief elements of danger which the railway companies regard as serious is this, that if vapour should be given off, which with the flashpoint I have mentioned may well happen, and were to ignite, most serious consequences would follow, and what might have been a small fire, easily controlled, would rapidly become a serious conflagration through the naphtha coming in contact with other goods on the companies' wagons or premises.

I would mention, before I conclude my judgment, that the defendants complain of the evaporation test which appears in the railway classification of 1919. It was inserted, after much consideration and for very sufficient reasons, in order to prevent the consignment for carriage of dangerous oils such as this without their being properly declared, while protecting creosote and other safe oils with a high flashpoint against such restriction. It is admitted by the defendants' witnesses that for that purpose it is a fair test. It is not perhaps

absolutely precise in its terms, but there is no real ground for suggesting that it is an improper and unsatisfactory test or not definite enough for all practical purposes.

In my opinion, therefore, the applicants are entitled to the declaration which they claim, but I think it should run as follows: A declaration that the traffic mentioned in the schedules to the application is naphtha coal tar, and that the applicants are entitled to treat such traffic as dangerous goods within the meaning of Part IV. of the schedules to the Midland Railway Company and the Great Western Railway Company (Rates and Charges) Orders Confirmation Acts, 1891, and the Lancashire and Yorkshire Railway Company (Rates and Charges) Order Confirmation Act, 1892.

MR. TINDAL ATKINSON, K.C.: I agree. If the railway companies in this case still retain their power under section 105 of the Railways Clauses Act, 1845, to treat these consignments as dangerous goods, then I think the only question for this Court is whether that power has been honestly and reasonably exercised. The defendants say that the companies have lost that right in respect of these goods owing to their inclusion in the list of non-dangerous oils found in the statutory classification of 1891. In effect they say that section 105, so far as this class of goods is concerned, is repealed. This contention must rest upon the basis that these consignments are mineral tar oils within the proper definition of that term, and, therefore, so long as that condition is satisfied, it matters not what view the companies may take as to their dangerous character.

The companies, on the other hand, contend that the proper description of these articles is—with the exception of two consignments—purely naphtha, and as to the remaining two, heavy naphtha. And they say they have proved this by well-known and reliable tests. They say that all are dangerous. If it is necessary to determine what is the proper description of these consignments, I think that the companies

have proved it to be naphtha. Prior to the 1891 classification these companies had scheduled mineral tar oils as dangerous goods when the vapour ignited at certain temperatures, under Class A when the flashpoint was under 73 degrees Fahrenheit, under Class B when the flashpoint was under 150 degrees. It is suggested that the committee which settled the statutory classification and rates with the companies' schedules before it, intended to recommend Parliament to override the latter and to lump together all mineral tar oils in a non-dangerous list, by necessary inference repealing section 105 of the Railways Clauses Act, 1845. I think this view is incredible. In my judgment, what was intended was to include as non-dangerous only those mineral tar oils which were above the flashpoint adopted by the companies before 1891. The moment it is found that there are mineral tar oils, not otherwise provided for, which answer that description, there is in my view an end of the defendants' case. We were told that there are a number of such oils, namely, creosote oil (not creosote), anthracene oil as distinguished from anthracene, grease, exhaust, and other heavy oils which have a flashpoint above 150 degrees, and therefore are admittedly safe. In my opinion the statutory list applies to these only, and was never intended to include other oils of a possible dangerous character.

It is not, in my opinion, necessary, and I think that it would be highly inconvenient and improper for this Court to decide the question whether these goods are in point of fact dangerous or not, as such a decision might conflict with the judgment of the companies to whom Parliament has given the power of adjudication. I find there is no ground whatsoever for saying that the applicant companies have not honestly and reasonably exercised their judgment in treating these goods as dangerous; and I think, therefore, they are entitled to the form of declaration which has been indicated by my Lord.

MR. MACNAMARA: I agree with the conclusions stated in my Lord's judgment, and in the judgment of the learned Commissioner. Railway companies are not bound to carry goods which in the *bona fide* exercise of their judgment they consider dangerous; but if they elect to carry, the rate charged must be a reasonable one.

Solicitors—Beale & Co., for the Railway Companies; Neish, Howell & Haldane, for the defendants.

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